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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1073

TRAP ROCK INDUSTRIES, INC.,
a New Jersey Corporation,

*Petitioner,*

*vs.*

JOHN C. KOHL, Commissioner of Transportation, and
JAMES R. SCHUYLER, State Highway Engineer,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

SCHAPIRA, STEINER & WALDER,
*Attorneys for Petitioner,*
17 Academy Street,
Newark, New Jersey, 07102.

JUSTIN P. WALDER,
*Of Counsel to Petitioner.*

JEFFREY BARTON CAHN,
*On the Petition.*

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*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Trap Rock Industries, Inc., a New Jersey Corporation prays that a writ of *certiorari* issue to review the judgment of the New Jersey Supreme Court entered in this case on November 23, 1971:

## Opinions Below

The New Jersey Supreme Court issued a written opinion and mandate in this matter on November 23, 1971, 59 N. J. 171, 281 A. 2d 161 (1971), reversing a final judgment of the New Jersey Appellate Division and reinstating a final determination of the New Jersey Commissioner of Transportation which suspended the bidding prequalification of Petitioner, a corporation which does a substantial portion of its business with government agencies after sealed public bidding. This matter arose originally as an administrative hearing before the New Jersey Commissioner of Transportation. The Commissioner on March 29, 1971 notified Petitioner that its right to bid on New Jersey Department of Transportation contracts was suspended because its President and Principal shareholder had been indicted. It is conceded that the indictment is totally unrelated to any business purpose of the Petitioner. Significantly, the individual indicted was at no time made a party to the administrative proceedings. On May 6, 1971 the Commissioner held a hearing in which no testimony was presented and the only evidence introduced by the Agency was the indictment, over the objection of Trap Rock's counsel, and by Trap Rock, Mr. Stavola's plea of not guilty. On May 7, 1971 the Commissioner rendered a written final determination in which it was held that the existence of the indictment of Mr. Stavola evidenced the Corporation's lack of moral integrity and that the Corporation's bidding prequalification was suspended until the indictment was satisfactorily explained by the corporation. The New Jersey Appellate Division in a written opinion and mandate dated June 30, 1971, 115 N. J. Super. 278, 279 A. 2d 138 (App. Div. 1971) reversed the determination of the Commissioner, holding that the suspension of the Corporate Petitioner on the sole basis of a mere indictment of Mr.

Stavola violated the presumption of innocence and that the suspension, based solely upon a bare indictment, was lacking in competent evidence in support thereof.

Copies of all three opinions are appended hereto as Appendices A, B, and C. Appendix D is the original notice of suspension directed to Trap Rock Industries, Inc. only.

## Jurisdiction

The judgment of the New Jersey Supreme Court here sought to be reviewed is contained in the written opinion of that Court appearing as Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3) which allows review by writ of *certiorari* of any final judgment of the highest Court of a State where any right, privilege or immunity is specially set up or claimed under the United States Constitution and this Court's Rule 19 (1) (a) setting forth as a consideration for granting the writ a state court decision of a substantial federal question either undetermined previously by this Court or decided in a way probably at variance with its applicable decisions. Additionally, Petitioner claims jurisdiction under 28 U.S.C. § 2101 (c) and this Court's Rule 23 allowing the filing of a petition for a writ of *certiorari* in a civil action within ninety days after the entry of the judgment sought to be reviewed.

## Questions Presented

1. May the New Jersey Commissioner of Transportation, consistent with the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment debar from public sealed bidding a corporation with

an existing bidding prequalification on the sole basis of its failure satisfactorily to explain the contents of an indictment of its principal officer and stockholder in which the offenses charged were entirely unrelated to any corporate purpose of business?

2. May the New Jersey Commissioner of Transportation consistent with the Due Process clause of the Fourteenth Amendment debar a prequalified corporation from public sealed bidding without existing rules, regulations or procedures and without a hearing in which testimony is presented?

3. Does not the New Jersey Commissioner of Transportation violate the Due Process of law requirement of the Fourteenth Amendment by debarring from public sealed bidding a prequalified corporate bidder on the basis of lack of moral integrity based entirely upon the contents of an indictment of the principal shareholder who was not involved in the daily operation of the business under circumstances where the charges in the indictment were unrelated to any corporate purpose or business and where there is a complete absence of any existing statute, rules or regulations establishing standards, procedures and consequences for debarment upon such ground?

4. May the New Jersey Commissioner of Transportation constitutionally require that, consistent with an individual's Fifth Amendment rights to remain silent and to be free from being required to answer criminal charges except after indictment in a court of law and the Fourteenth Amendment right to due process of law, a prequalified corporation be debarred from all public work sealed bidding in the State of

New Jersey where the State of New Jersey is either the contracting or funding party unless and prior to the commencement of any criminal proceedings the corporation satisfactorily explains the contents of an indictment of its principal stockholder where the charges contained in the indictment do not involve corporate business?

5. Is not the suspension by the Commissioner of a State Agency of a corporation's bidding prequalification for alleged lack of moral integrity based upon a mere indictment of the corporation's principal shareholder respecting alleged matters not related to the Corporation's business where moral integrity is not set forth in otherwise explicit rules and regulations regarding the granting and maintenance of bidding prequalification a bill of attainder in violation of Article I § 10 of the United States Constitution?

Questions 1-4 are treated in Section I of the reasons for granting the writ of *certiorari*. Question No. 5 is treated in Section II.

## Constitutional Provisions Involved

ART. I. § 10. * * *

"No State shall * * * pass any Bill of Attainder * * *"

AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV

§ 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Statement of the Case and Basis of Federal Jurisdiction

Federal jurisdiction in this matter is claimed as a result of the violation of Petitioner's federal constitutional rights by the New Jersey Commissioner of Transportation and the subsequent affirmance by the New Jersey Supreme Court of the Commissioner's action of suspending the existing bidding prequalification of Trap Rock Industries, Inc. on grounds never set forth either in statute or rule or otherwise. Those grounds were that the petitioner corporation lacked moral integrity. This finding was made on the basis of a mere indictment charging the President

of the corporation with several offenses. The suspension was imposed in the absence of any statutes or rules which establish standards either for the imputation of actions of individuals to corporations, for the length of time of such debarments or any reference to moral integrity.

### A. The New Jersey Statutory Scheme

Pursuant to N.J.S. 27:7-35.1 *et seq.* all persons who desire to bid on New Jersey Department of Transportation contracts must first be classified by the Department as to the character and dollar amount of work upon which they shall be qualified to bid. N.J.S. 27:7-35.2. This license to bid is referred to as a "prequalification classification" and a bidder holding such license is referred to as "prequalified." Trap Rock Industries, Inc. [hereinafter referred to as Trap Rock, Inc.] was prequalified to bid on contracts ranging in dollar amounts from $10 million to $15 million for the period February 4, 1971 to January 31, 1972. The Commissioner has termed such classification as Heavy Highway Class O. The corporation had been prequalified to bid for a period of years prior to the current classification.

Under the above statutes criteria are set forth which the legislature deemed significant in relationship to the prequalification. These include adequacy of plant, equipment, and experience as well as organizational and financial responsibility. Additionally the Commissioner is empowered to make such rules and regulations as may be necessary to effectuate the purposes of the prequalification statutes. N.J.S. 27:7-35.11. As part of such rules the Commissioner is specifically empowered to require prospective bidders to make a statement under oath not only as to financial and technical ability, adequacy of organization and experience but also "such other pertinent and material facts as may be deemed desirable." N.J.S. 27:7-35.3.

The Commissioner, pursuant to these statutes, promulgated rules and regulations which did not go beyond the statutory criteria as to prequalification but which did specifically provide that the regulations were to be "strictly adhered to and no deviation whatsoever will be allowed." N. J. Dept. Transp. Rule 16:33-2(b)(13). Neither the Rules nor the statute make any mention of moral integrity as a basis for the granting or maintenance of prequalification. Nor do they in any way indicate under what circumstances if any the finding of an indictment against an officer or stockholder of a corporate contractor will be imputed to the corporation and will result in the loss of the corporation's existing prequalification. Likewise, there is no indication in statute or rule what type or nature of offense (i.e. disorderly persons offense, misdemeanor, high misdemeanor) must be charged to result in suspension. Moreover, no rule or statute indicates whether it is significant whether or not the indictment charges offenses related to the performance of public contracts.

In the absence of any statute or rule governing the issues of moral integrity, the imputation of individual's actions to bidder corporations or the length of suspensions for forbidden conduct, the Commissioner alleged authority to make a determination on those issues and to suspend permanently the prequalification of Trap Rock, Inc. under N.J.S. 27:7-35.8 which permits the Commissioner to void a classification because of "developments subsequent to the classification" which would affect the responsibility of Trap Rock Industries, Inc." These "developments" were the indictment, above-mentioned, of the president of the bidder. The term "developments" is nowhere denied. Moreover, the corporation offered to fully account for its performance of all public contracts and to reaffirm all its qualifications in accordance with the existing statutes and rules.

**B. The Bidder Corporation—Trap Rock Industries, Inc.**

Trap Rock, Inc. is a privately held corporation. Its business is the manufacturing, processing and distributing of crushed stone, bituminous concrete, ready-mix concrete, road oils and emulsions throughout New Jersey. Also, the corporation engages in contracting. Its annual gross sales approximate $27 million. A substantial portion of its business is with state agencies and local governmental entities with state funding pursuant to New Jersey State public bidding statutes.

Trap Rock, Inc. employs between 500 and 800 persons during any week and has a weekly payroll of between $110,000 and $125,000.

The corporation was formed in 1966 by the sale to it of all the assets of seven corporations from the estate of Linus R. Gilbert for an aggregate purchase price of $19 million. Of this, 3.4 million was paid in cash at the time of sale. The cash was obtained from loans given by Rubberoid Corporation and from American Cement Co. in exchange for security and senior preferred stock and from the sale of junior preferred stock at par and no par common stock to ten individuals including Michael J. Stavola, currently the president. The balance due after the cash payment to the Gilbert Estate was $15.6 million dollars for which a note was given.

Currently, there remains due on the note to the Gilbert Estate approximately $11,775,000 in principal plus accumulated interest of approximately $2 million.

The preferred stock of all classes has been redeemed, the loans to Rubberoid and American Cement having been paid. Additionally, Michael Stavola now owns approximately 80% of the outstanding shares of common stock and serves as president and board chairman.

The Board of Directors consists of five persons including Michael Stavola who, as president, according to the by-laws serves subject to the direction of the Board.

The day-to-day business operations of Trap Rock, Inc. are carried out by David Mendelson and Harry Evans. Michael Stavola takes no part in these day-to-day operations.

**C. The Suspension of Trap Rock, Inc.'s Bidding Prequalification.**

On March 29, 1971 the State Highway Engineer by letter notified Trap Rock, Inc. that its existing bidding prequalification had been suspended allegedly as a result of "developments subsequent to its classification." The referenced development was the mere fact of indictment during February, 1971 of Michael J. Stavola. The Stavola indictment grew out of an alleged assault and battery incident the indictment of which was dismissed. It was alleged that Mr. Stavola had bribed a State Police officer to obtain a favorable disposition of the earlier assault and battery charge. The indictment in no way related to the performance of Trap Rock, Inc. or Mr. Stavola of any public contract or construction work. Mr. Stavola was never noticed with respect to this matter and was never made a party to the proceeding. Moreover, Mr. Stavola did not engage as an individual in any contracting with the State of New Jersey or its political subdivisions.

On April 8, 1971 Mr. Stavola denied each and every allegation and charge in the indictment by entering a written plea of not guilty. The entire course of administrative and judicial action respecting Trap Rock's prequalification suspension was carried out before any court or jury had passed upon Mr. Stavola's guilt of the charges.

On May 6, 1971 the Commissioner of Transportation convened a hearing concerned with the suspension of Trap Rock, Inc. At this hearing the Commissioner's personal counsel conducted the proceedings and acted as prosecutor. He stipulated that the suspension of the corporation was solely as a result of the indictment of Mr. Stavola and did not in any way charge that Trap Rock, Inc. no longer was a responsible bidder on the basis of the statutory and rule criteria of prior experience, and adequacy of finances, plant and equipment.

At the hearing the indictment was introduced for all the "facts stated in the indictment" and the corporation was called upon to explain the actions of an individual not a party to the proceeding at a time before the criminal charges, unrelated to any corporate purpose and not approved or acquiesced in by the corporation, had been passed upon in court and before any pretrial discovery could be conducted. The indictment was accepted as evidence over the objections of Trap Rock's counsel. In response to the indictment Trap Rock, Inc. introduced Mr. Stavola's plea of not guilty together with a statement by counsel that Mr. Stavola is presumed innocent until proven guilty and that he has an absolute right to remain silent and suffer no penalty for such silence. Moreover, Trap Rock, Inc., offered to answer any and all questions which the Department of Transportation may pose concerning all of its performance of public contracts and to substantiate any work performed and submit to any accounting examination pertaining thereto. The Commissioner's counsel rejected the offer, responding that the sole issue was the moral responsibility of Trap Rock, Inc. The Commissioner presented no live witnesses against the corporation with respect to the contents of the indictment or that the charges therein related to any corporate purpose of the bidder corporation.

The remainder of the hearing consisted of the introduction of stipulations concerning Trap Rock, Inc. as well as numerous character witnesses who would testify favorably that Mr. Stavola is known as a person of high moral integrity and character in the communities in which he works and resides, and the introduction of the Rules and Regulations of the Department of Transportation as the same relate to bidding requirements and matters of responsibility and classification of bidders.

On May 7, 1971 the Commissioner issued his final determination, set forth herein as Appendix C, in which he accepted the charges set forth in the indictment as "facts." He also acknowledged the existence of the not guilty plea as well as the fact that Mr. Stavola did not have the opportunity to appear before the grand jury which returned the indictment.

The Commissioner held that "Michael J. Stavola is Trap Rock Industries, Inc." and it is required to act in accordance with his will. Further he concluded that the corporation and Michael J. Stavola bore the burden of proof to explain the "facts" that he accepted from the allegations contained in the indictment. The Commissioner's holding that Michael J. Stavola and Trap Rock, Inc. were one was made notwithstanding the fact that it was stipulated and agreed that Mr. Stavola does not participate in the day-to-day operation of the business and that the Corporation has as officers who operate the business a Vice-President in Charge of Construction, a Secretary-Treasurer and an Assistant Treasurer as well as a five-man Board of Directors of which Michael J. Stavola is but one member.

As legal conclusions the Commissioner held that moral integrity is a proper ground for classification of a bidder

and that a mere indictment of an individual such as that in the instant matter is dispositive of that issue notwithstanding the presumption of innocence. Finally, he held that his discretion would be exercised by disqualification of the corporate entity Trap Rock, Inc. on the ground that Michael J. Stavola individually, lacked moral integrity.

The determination fails to set forth any statute or rule which in any way gives a contractor prior notice that moral integrity is in any way an issue respecting prequalification or that the private non-business actions of an individual may be imputed to a corporate bidder.

The determination concludes with a permanent suspension of the bidder although no statute or rule provides any periods of suspension or debarment.

The State of New Jersey through its Attorney General has extended the legal effect of the Commissioner's determination from the New Jersey Department of Transportation to other state agencies and to all work which involves funding by the State, thus bringing substantially to a halt the entire construction business of the bidder corporation.

## Reasons for Granting the Writ

### I.

Trap Rock, Inc. has been permanently debarred from New Jersey Department of Transportation contracting work on grounds and under procedures of which it never had notice before the Department suspended its existing bidding prequalification on nothing more than the mere paper allegations contained in an indictment of a stockholder. Such administrative action clearly violates the right of the corporation, its stockholders, employees and creditors to due process of law.

As Mr. Chief Justice Berger said in a case decided while he was a member of the Court of Appeals for the District of Columbia:

> "* * * Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses all culminating in administrative findings and conclusions based upon the record so made * * *" (*Gonzalez* v. *Freeman*, 334 F. 2d 570, 578 (D. C. Cir. 1964).)

In the matter at bar it is beyond cavil that there were no statutory or rule standards relating to prequalification to bid which made the issue of moral integrity a matter to be decided by the Commissioner of Transportation. Moreover, no rule or statute provided any procedure for the imputation of the private actions of a stockholder to a corporation or established a set period of suspension for specifically prohibited conduct.

In the case of *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D. C. Cir. 1964) the Court reversed the debarment of a corporation doing business with a government agency where a principal thereof had been indicted and subsequently pleaded guilty to an offense growing directly out of the corporation's business relationship with the agency. In that case Mr. Chief Justice Berger held that even the fact of such a plea of guilty could not be used as evidence to debar a corporation unless corporate knowledge or participation in the illegal activity were proved. 334 F. 2d at p. 578, n. 17. In addition, the lack of any standards or regulations which would have given notice of proscribed conduct as well as procedures before the agency on a pro-

posed debarment was held to deny jurisdiction to the agency to pass on the debarment. Further, it was held that the lack of such regulations resulted in an arbitrary abuse of discretion since the agency denied the basic guarantees of fundamental fairness to the debarred persons and corporations, including the right to cross-examine witnesses. *Gonzalez v. Freeman, supra*, 334 F. 2d at p. 578.

In *Gonzalez, supra*, a corporation which had an established record of contractual relations with Commodity Credit Corporation, a government corporation, received notice that it, its officers and affiliates which included corporations and individuals, as well as "any corporation in which Thomas or Carmen Gonzalez was a partner or officer," 334 F. 2d at p. 572, were temporarily debarred from doing business with Commodity Credit Corporation. The debarment was to be pending an investigation into possible misuse of official Commodity Credit Corp. inspection certificates by the corporation in the course of business under Commodity Credit auspices. The suspension was then continued pending a Justice Department investigation which resulted in the indictment of Thomas Gonzalez for the felony of alleged misuse of official Commodity Credit Corp. inspection certificates. This indictment was ultimately dismissed and Gonzalez pleaded guilty to a misdemeanor involving essentially the same facts. Thereafter, and some two years after the initiation of the temporary suspension, Commodity Credit Corp., after consideration of information submitted by the Corporation and its attorneys notified the Gonzalez Corporation, Thomas and Carmen Gonzalez "and any firms in which [they] may be a partner or officer" that they had been debarred from participating in any Commodity Credit Corp. programs for five years.

It was undisputed in *Gonzalez, supra* that there existed no regulations established by Commodity Credit Corp. authorizing or governing debarment for misuse of official inspection certificates as was charged in the indictment, although §§ 3(a) and (b) of the Administrative Procedure Act required every agency to publish regulations which would fairly apprise the public of its formal and informal procedures, rules, general policy and other similar pertinent information. 5 U.S.C. § 1002 (a), (b). See 331 F. 2d at pp. 577-578. A similar provision is part of the New Jersey Administrative Procedure Act, N.J.S. 52:14B-3; and see N.J.S. 27:7-35.17 allowing the Commissioner of Transportation to promulgate regulations concerning and controlling the qualifications of bidders.

Chief Justice Burger began his analysis by distinguishing the case before him from one in which a new bidder seeks to qualify. Thus, while noting that there is no "right" to do business with the government, the Chief Justice held that an established relationship cannot arbitrarily be severed.

> "* * * Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences." (331 F. 2d at p. 571.)

In a footnote the Chief Justice quoted approvingly from a law review article which stated the primary economic consequence of debarment. "As such, the power of debarment is tantamount to one of life or death over a business." 331 F. 2d at p. 571, n. 3. The Chief Justice held that the Court could take judicial notice of "such economic consequences as basic facts of economic life."

Of the various issues raised in the *Gonzalez* case, those which are of immediate importance in the context of the within case are whether the Commodity Credit Corp. had authority to debar the corporation and individuals in the absence of regulations establishing standards and procedures and further, in the absence of an evidentiary hearing and findings on charges of misconduct. The Court held that Commodity Credit Corp. had implicit authority to debar irresponsible contractors, 334 F. 2d at pp. 576-577, but the ultimate holding and decision was that the agency could not do so unless clear published standards existed and anyone charged was afforded uniform minimum fairness safeguards which included an evidentiary hearing built upon the fundamental right to cross-examine the witnesses arrayed against the contractors. 334 F. 2d at pp. 577-580.

The Chief Justice noted that persons who contract with the government are entitled to have full notice of the standards and procedures which regulate the relationship of the parties. As to the debarment before the Court, he stated that

> "* * * Neither the appellants nor others similarly situated can turn to any official source for guidance as to what acts will precipitate a complaint of misconduct, how charges will be made, met, or refuted, and what consequences will flow from misconduct if found. In the contractual relationship shown by this record an experienced businessman could reasonably anticipate that some agency action might well be taken as a result of misuse of inspection certificates, but he could only speculate as to the nature of the action and the processes by which it would be effected. This condition does not

accord with the provisions of the Administrative Procedure Act. On this record there is neither the appearance nor the reality of fairness in the process by which debarment of appellants was accomplished. Disqualification from bidding or contracting for five years directs the power and prestige of government at a particular person and, as we have shown, may have a serious economic impact on that person. *Such debarment cannot be left to administrative improvisation* on a case-by-case basis. The government power must be exercised in accordance with accepted basic legal norms. * * *" (334 F. 2d at p. 578. (Footnotes omitted; emphasis added.))

The Chief Justice continued by setting forth, in an already quoted portion of the opinion, that before such drastic action as debarment could be taken, basic fairness requires *inter alia* that administrative regulations establishing standards and procedures must be in existence. 334 F. 2d at p. 578. See page 14, *supra*.

In reviewing the record it was found by the *Gonzalez* court that although Commodity Credit Corp. had the power to debar under the circumstances disclosed, the debarment was invalid because it was not authorized by statute or governed by regulation and, therefore, the debarment action could not be lawfully taken without those safeguards which satisfy the demands of fairness. As to those safeguards it was clear that there was no detailed specification of charges and

"* * * No hearing was held, no evidence recorded, no findings were made. At no point were appellants in a position to cross-examine officials who proffered or supported the allegations which pre-

sumably led to the debarment." (334 F. 2d at p. 579.)

Significantly, it was held that to reach any other conclusion would give rise to serious constitutional issues. Cited in support of that statement was *Greene v. McElroy*, 360 U. S. 474 (1959), which together with several other cases decided by this Court, *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Jenkins v. McKeithen*, 395 U. S. 411 (1969); *Willner v. Committee on Character and Fitness*, 373 U. S. 96 (1963); *Peters v. Hobby*, 349 U. S. 331 (1955), as well as New Jersey Supreme Court Cases, *e.g.*, *Mazza v. Cavicchia*, 15 N. J. 498 (1954); *Pennsylvania R. Co. v. Department of Public Utilities*, 14 N. J. 411 (1954), and statutes, N.J.S. 52:14B-10(a); N.J.S. 52:14B-9(f) (New Jersey Administrative Procedure Act), make the right to cross-examine and confront witnesses in administrative hearings a guaranteed right under the due process clause of the Fourteenth Amendment.

The theory of the *Gonzalez* case is one of historically proven efficacy—the balancing of genuine and legitimate interests. Thus:

> "* * * The governmental interests on the one hand and the individual interests on the other must be balanced and the procedures established must be considered in light of various questions which courts have postulated from time to time: How was the individual likely to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action? The Supreme Court found severe economic injury in Greene vs. McElroy, supra, which was probably dispositive; in [Cafe-

teria and Restaurant Workers Union vs. McElroy, 367, U. S. 886 (1961)] the injury was neither severe nor lasting." (334 F. 2d at pp. 579-589.)

And see *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 163 (1951) (Frankfurter, J., concurring) (quoted in pertinent part in *Gonzalez*, *supra*, 334 F. 2d at p. 580, n. 20.) See also *Gonzalez*, *supra*, at n. 21 which states that the individual interest is one protected by concepts of fundamental fairness and a procedure which includes as basic elements "published standards, notice, grounds, opportunity to respond and be heard and, *subject only to essential national security considerations*, to cross-examine those whose information is used as a basis for an adverse decision." (Emphasis added.)

The New Jersey Supreme Court disregarded the clear holding of *Gonzalez*, *supra*, as well as the constitutional issues raised therein with the comment that that case stands for the view that if a *specific act* is itself to be sufficient grounds for debarment, the agency should prohibit the act by rule and announce that a violation could itself lead to such consequences." (Italics in original.) It is clear from a reading of the case that the Chief Justice and the Court of Appeals never intended so limited a holding as that given to *Gonzalez* by the New Jersey Supreme Court. That Court's holding fails to take cognizance of the Chief Justice's analysis concerning the absence of rules or regulations providing for the standards and procedures by which the agency could act upon an intended debarment. See especially 334 F. 2d at p. 578 quoted in pertinent part *supra*. The New Jersey Supreme Court erred in its failure to perceive the constitutional thrust of *Gonzalez*, to the effect that fundamental

fairness in administrative proceedings requires not only that there be standards of conduct but also that there be existing and established procedures for the hearing of complaints and the meeting and resolution of the issues involved therein so that bidders need not speculate on what agency action might be. Thus, under *Gonzalez*, it is not merely a question whether moral integrity or lack thereof is related to doing business with the agency. Rather, it is whether on the whole the exercise of the government's power, which may have "serious economic impact" upon bidders such as Trap Rock, Inc. whose legitimate business expectations are built upon an established bidding prequalification, has been accomplished in a manner consistent with fundamental fairness and basic legal norms. Not disputed herein is the government's implicit power to determine and act upon the responsibility of bidders. Just as in *Gonzalez*, all that petitioner demands is that the government's actions comport with the constitutional dictates of due process of law. Thus the actions of the Commissioner in the instant matter must be examined in light of the total absence of any rules or regulations which could forewarn bidders of the relevant standards and procedures which might be marshalled by the Commissioner to end Trap Rock, Inc.'s existing bidding prequalification.

The New Jersey Supreme Court and the Commissioner of Transportation in his determination assumed the parameters of a concept of the integrity of a corporation viewed from a morality point of view and applied that concept retroactively to Trap Rock, Inc. The evil inherent in this procedure from the point of view of due process of law under the Fourteenth Amendment is that the establishment not only of such a concept but also both the standards and procedures for applying it to particu-

lar cases as well as the consequences of a determination of lack of integrity must not be performed as a judicial function by a court or an administrative agency. Rather, it is most properly a legislative function to be performed either by the legislature itself or by an administrative agency promulgating rules and regulations for prospective application pursuant to an appropriate grant of power. The Commissioner's Determination as affirmed by the New Jersey Supreme Court herein with its serious economic impact upon Trap Rock, Inc. and its constituent elements partakes of the very lack of fundamental fairness inveighed against by Mr. Chief Justice Berger in *Gonzalez v. Freeman*, *supra* where it was said that debarment cannot be left to administrative improvisation on a case-by-case basis and that the exercise of such devastating governmental power must be performed pursuant to basic legal norms including established and existing standards and procedures in which the requisites of fundamental fairness are observed. 334 F. 2d at p. 578.

"Neither the statutes nor the rules of the Department of Transportation provide either the general category of moral integrity (or its equivalent) or any standards for the determination thereof or for the imputation of individual conduct to a corporation or guidelines for periods of time of debarments. See N.J.S. 27:7-35.3, which requires the prospective bidders to make a statement under oath concerning

> "* * * financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder, and also such other pertinent and material facts as may be deemed desirable."

Thus, the Legislature in setting forth the nature of the information required to obtain the valuable property right of a bidding prequalification made no mention of any question of moral integrity or the like. See generally N.J.S. 27:7-35.1-27:7-35.12. These statutes give to the Commissioner the right to determine what other pertinent information might be "deemed desirable." Examination of the rules promulgated under the Classification statutes reveals that no standards or procedures relating to suspension or debarment were ever set forth. See Dept. Transp. Rule 16:33-2. Since the only standards that were set repeated the statutory standards of financial, organizational and technical ability it is clear that these are the only standards which may properly guide a determination by the Commissioner and this Court. *Gonzalez v. Freeman*, 334 F. 2d 570 (D. C. Cir. 1964). The Commissioner's rules also include the requirement that "The above Regulations will be strictly adhered to and *no deviation whatsoever* will be allowed. Dept. Transp. Rule 16:33-2(b) (13) (Emphasis added.) By his action in the within matter the Commissioner without warning or notice deviated substantially from his own rules and entered an area for which no statutory or rule guidance exists and one certainly not to be considered within his expertise.

Significantly, when integrity is a criterion for determining responsibility and prequalification and the lack thereof may result in debarment the standards which must be met are set forth either in statute or in rules promulgated in furtherance of powers legislatively granted to the administrative agency. Thus, when a standard of integrity exists such as under the Federal Procurement Act, it is specifically provided that:

> "In order to qualify as responsible a prospective contractor must, in the opinion of the contracting officer meet the following standards * * *:
>
> (4) [Have] a satisfactory record of *integrity*, judgment and performance. * * *" (41 *C.F.R.* § 1-1.310-3(a) (Emphasis added.))

Clearly no such provision or standard exists either in New Jersey's Title 27 or in the rules promulgated by the Commissioner and filed with the Secretary of State as required by the New Jersey Administrative Procedure Act, N.J.S. 52:14B-3 and by N.J.S. 27:7-23.11. It is not the function of the New Jersey Supreme Court to legislate and inject an integrity standard as part of the bidding prequalification statutes, N.J.S. 27:7-23.1 *et seq.*, nor to assume the rule-making authority of the Commissioner and promulgate a new regulation making moral integrity a criterion regarding prequalification to bid. Likewise, the Commissioner lacks jurisdiction to delay absent appropriate established standards and guidelines consistent with fundamental fairness. *Gonzalez v. Freeman*, 334 F. 2d 570 (D. C. Cir. 1964); *see Dixon v. Gitserot*, 29 N. J. 1; 148 A. 2d 14, 18 (1958).

Moreover, when integrity has been made a standard for determination of responsibility, the factors and consequences of determination of the issue have been intricately woven into standards which clearly forewarn prospective bidders and protect bidders and contracting agencies alike. *See, e.g.*, 41 *C.F.R.* § 1-1.604-1; 1-1.605(b); 1-1.605-1(a). Thus, under the federal procurement regulations any suspension, which is considered a "drastic action, * * * shall not be based upon an unsupported accusation." 41 *C.F.R.* § 1-1.605(b). Factors to be considered in

determining whether there is "adequate evidence" to merit suspension include the "amount of credible evidence available," and "the existence or absence of corroboration as to important allegations, as well as [consideration to be given] to the inferences which may properly be drawn from the existence or absence of affirmative facts." 41 *C.F.R.* § 13.605(b).

On the significant issue of the imputation of the actions of an individual to a corporation, the federal standards state that a business concern may not be affected by the actions of an individual except as specifically set forth in 41 *C.F.R.* § 1-604-1(c) (3):

> "The criminal, fraudulent, or seriously improper conduct of an individual may be imputed to the business concern with which he is connected, where such grave impropriety was accomplished within the course of his official duty or was effected by him with the knowledge or approval of that concern."

No provision exists which would support a suspension under the circumstances present in the within case, where the indictment makes charges wholly unrelated to the business of Trap Rock, Inc., where the charges are not supported by any evidence of any kind, where the Commissioner has offered no proof of any kind that the other members or employees of Trap Rock, Inc. knew of or approved any illegal act attributed by allegation to Mr. Stavola.

The federal standards do not impute to a corporation the actions of a shareholder or officer simply because he holds stock or is an officer or both. The test is whether the shareholder or officer engaged in prohibited conduct

either in carrying out the official business of the corporation or with the knowledge and approval of the corporation. Any test designed to determine imputation of individual action to a corporation based upon the percentage of an individual's stockholdings is entirely unfair to the corporation and produces anomalous results when applied to different corporations. Such a test raises the issue whether debarment should occur if the stockholding is but 5% of the stock or whether it must be 51%. What is the result if the stockholding is but 48% and the shareholder in question is the individual who actually operates the day-to-day business of the corporation? Compare this with the situation at bar where the stockholder in question holds 80% of the stock but does not engage himself in the day-to-day operation of the corporation's business. Should not the nature of the conduct complained of be the significant factor, together with the existence of or absence of corporate participation or acquiescence as under 41 *C.F.R.* § 1-604-1(c)(3). Such considerations at present do not exist in the State of New Jersey either by statute or through the rule-making authority of any of its administrative purchasing agencies. Indeed, under an appropriate standard the Petitioner could not be debarred for the individual conduct and purpose referred to in the indictment.

By contrast, where no regulations existed, a debarment similar to but even more compelling than that at bar was unequivocally reversed by Mr. Chief Justice Berger in *Gonzalez v. Freeman*, 334 F. 2d 570 (D. C. Cir. 1964).

It is the very lack of any standard to guide the contractor and the Commissioner on the questions of moral integrity, imputation to Trap Rock, Inc. of anything which may have been done by Mr. Stavola, and the type of punitive action to be taken when lack of moral integrity

is determined which is the root of the denial of fundamental due process of law inherent in the Commissioner's erroneous permanent suspension of Trap Rock, Inc.

This Court as well as federal and state courts have long recognized that the most basic element of due process of law especially where sanctions may be involved is that prohibited conduct should be clearly set forth in advance of any proceeding to impose a penalty. In *Cox v. Louisiana*, 379 U. S. 559 (1965), this principle is stated clearly and simply:

> "* * * There is an equally plain requirement for law and regulations to be drawn so as to give citizens fair warning as to what is illegal. * * *." (*Cox v. Louisiana*, *supra*; at 379 U. S. p. 574.)

Cases setting forth this requirement of clear notice of prohibited conduct often trace it in terms of vague or ambiguous laws which result in deprivation of due process of law. The principle was well-stated in this Court's often-quoted case of *Connally v. General Constr. Co.*, 269 U. S. 385 (1926) which held that

> "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law * * *" (269 U. S. at p. 391)

The principle of *Connally* applies no less in cases such as that at bar where no standard of conduct exists. Thus, this Court has given *Connally*, *supra*, contemporary significance and force in *Oates v. City of Cincinnati*, 402 U. S. 611 (1971), in which this Court last year held un-

constitutional as a violation of due process of law a statute which imposed a penalty without supplying any standard of conduct which could guide one in avoiding the sanction.

There is no reason why administrative agencies which exercise judicial power, such as the Commissioner of Transportation did in the matter at bar, and can impose sanctions which in effect destroy the business of a corporation, see *Gonzalez v. Freeman, supra*, should not be required to act within this "first essential of due process of law," that both notice and a standard of conduct to forewarn persons affected must exist before a sanction may be imposed. It is clearly the law, as this Court has stated, that the power of an administrative agency is limited by the grant of power given by the legislature. Thus, in *Slack v. Wickard*, 321 U. S. 208 (1944), it was said that

> "When Congress passes an Act empowering administrative agencies to carry on government business, the power of those agencies is circumscribed by the authority granted. * * *" (321 U. S. at p. 209.)

Where inherent power exists under a grant of authority but no standards have been established under which to carry out such power, the agency is estopped by the demands of due process of law from imposing sanctions for the essential element of due process of law—notice—is absent. See *Gonzalez v. Freeman, supra; cf. Pardacci v. Rutland*, 318 F. Supp. 252, 257 (M. D. Ala. 1970). Imposition of any penalty where no notice of prohibited conduct exists is an arbitrary exercise of administrative power clearly violative of the due process clause. *Coates v. City of Cincinnati, supra; Cox v. Louisiana, supra; Connally v. General Constr. Co., supra.*

Such principles are not unknown to the New Jersey Supreme Court which has erroneously failed to give them effect in the instant matter. That Court has in past cases dealt harshly with such arbitrary and capricious abuse of administrative power. The claim of the Commissioner of power permanently to suspend a bidder on the sole ground of lack of moral integrity is entirely analogous to the later-voided legislative grant of power to the New Jersey State Board of Optometry to refuse, revoke or suspend a license to practice optometry for "any conduct which, in the opinion of the board, is of a character likely to deceive or defraud the public." In *Abelsons, Inc.* v. *New Jersey State Bd. of Optometry*, 5 N. J. 412, 75 A. 2d 867 (1950) the New Jersey Supreme Court declared that the proscribed conduct was so vague, indefinite and uncertain that the provision was void as a violation of due process of law. 75 A. 2d at p. 873. Likewise, neither the alleged lack of moral integrity relied upon by the Commissioner in the matter at bar nor the procedures by which sanction was imposed are delineated in any statute or rule. Thus, bidders are not given fair notice as to proscribed conduct. Indeed, the only "conduct" which exists in the matter at bar is the entry of a Not Guilty plea by the individual who was indicted. Clearly, the bare return of an indictment against an individual is not a matter subject to the control of the bidder corporation. The suspension of Trap Rock, Inc. in such circumstances clearly trenches upon the corporation's rights to due process of law because of the total lack of any ascertainable standard. *Abelsons, Inc., supra.* When so valuable a property right as a bidding prequalification is made the subject of suspension, the bidder is absolutely entitled to clear standards governing the exercise of administrative power so vast and potentially destructive and discriminatory if allowed to range uncontrolled. By af-

firmance of the Commissioner's action here the New Jersey Supreme Court stamped its imprimatur upon a case-by-case development of standards and procedures related to the determination of lack of moral integrity and its consequences. Compare *Gonzales v. Freeman*, *supra*, 334 F. 2d at p. 578. Thus, today a bidder would be suspended because a mere indictment was returned against a stockholder. Tomorrow it might be the mere investigation of a grand jury into the affairs of a stockholder or the public denunciation of a stockholder by the press or a politician with no crime charged. Arbitrary power once set in motion feeds upon itself and becomes a juggernaut.

A clear demonstration of the setting forth and use of federal debarment standards may be found in *Arthur Venneri Co. v. Paterson Housing Authority*, 29 N. J. 392, 149 A. 2d 228 (1959). See 41 C. F. R. § 1-4.310-5(a); § 1-1.604-1; § 1-1.605(b); § 1-1.605-1(a). In *Venneri* a contractor on a debarred list of one federal agency for admitted illegal conduct growing out of public contracting work was held properly denied a municipal housing authority contract where explicit rules and regulations of the federal funding agency dictated that the bidder could not be awarded the contract in question because of his debarment elsewhere in the federal system.

By contrast to the *Venneri* case, *supra*, where clear authority for rejection of a low bid abounded, the case of *Mal-Bros. Contracting Co. v. Kohl*, 113 N. J. Super. 144, 273 A. 2d 357 (App. Div. 1971) in dealing with the question whether moral integrity is a criterion for judging the bidding prequalifications of a contractor doing business as a partnership cited no standards and no direct authority for the suspension of a bidder on grounds of

alleged lack of moral integrity. 273 A. 2d at pp. 358-359. The *Mal-Bros.* Court did allude to the *Veiqueri* case with a "*cf.*" cite as its only citation, thus acknowledging that there is no authority which makes moral integrity one of the criteria which may properly be considered by the New Jersey Commissioner of Transportation in passing upon a prequalification. *Mal-Bros.* did not consider the other due process issues raised herein concerning imputation of individual action to a corporation or lack of established procedures. It is submitted that neither the *Mal-Bros.* case, the *Veiqueri* case, nor any other case cited by the Commissioner or the New Jersey Supreme Court is authority for the proposition that the New Jersey Commissioner of Transportation may suspend the bidding prequalification of a contractor for alleged lack of moral integrity under the circumstances herein where there is a total absence of controlling statutory or rule guidance as to standards and procedures to be employed and where moral integrity has not been made a criterion relevant to the maintenance of the bidding prequalification.

In *Gonzalez v. Freeman*, *supra* the Chief Justice spoke of the necessity for balancing the interests in determining whether to extend procedural safeguards. In the matter at bar Trap Rock, Inc. like the plaintiffs in *Gonzalez* relies for its business upon doing public sealed bid contract work for governmental entities in New Jersey. All of its employees and its creditors derive their income and repayment respectively from this business. Loss of Department of Transportation prequalification and consequential debarment from other governmental agencies is a severe economic consequence which results in the destruction of Trap Rock, Inc.'s business with no consequential gain to the State.

There is no compelling State need to violate the fundamental guarantees of due process of law to debar Trap Rock, Inc. and destroy not only its business but the livelihood of its employees. In public sealed bidding in New Jersey the State is fully protected by a rigidly enforced system and procedure designed to guarantee not only the lowest cost to the public for works performed but also that the work will be of very high quality fully consistent with the rigid contract specifications established by the contracting agency. The system begins with prequalification of contractors based upon their financial, technical and organizational abilities and past performance including substantial prior experience. Thus only experienced contractors may even submit bids. With each accepted bid the contractor must post a performance bond to guarantee that his work will be satisfactory and consistent with specifications. During the entire performance of each contract the contracting agency performs a multitude of on-site tests and inspections of materials, methods and product which further assure complete compliance with specifications as work progresses.

In the matter at bar it was conceded and admitted that Trap Rock, Inc. possessed all of the necessary attributes and abilities to comply with every existing published rule, requirement or statute concerning prequalification to bid. In addition, Trap Rock, Inc. had submitted the lowest bid on and performed numerous contracts under the system above outlined and its performance has never been assailed. Thus, the Corporation by submitting low bids while prequalified benefited the public by performing quality work pursuant to specifications at the lowest price bid for the job. Under such circumstances, a balancing of the interests of the public and the constitutional rights of the corporation can only result in a determination that no com-

pelling public need can be served by violating the most fundamental rights of the corporation to due process of law in order to allow debarment of the corporation from public bidding under the circumstances disclosed herein.

The Attorney General of New Jersey has recently stated that he will attempt to have the legislature of New Jersey or the various administrative agencies establish rules and regulations to deal with the vital issues of integrity and the procedures and consequences for suspension and debarment. This statement admits that no such standards currently exist in New Jersey and requires a review by this Court of the actions taken against the Petitioner under such an atmosphere and circumstances.

In the matter *sub judice* moral integrity has been raised as the sole criterion for determination even though neither statute nor rule provides for such a criterion and even though there are no standards or established procedures of any kind to guide the Commissioner in his determination or the Corporation in avoiding prohibited conduct or in meeting the changes made. Under such circumstances the lack of notice is a clear violation of the most basic and fundamental principles upon which the concept of due process of law as guaranteed by the Fourteenth Amendment is built.

Just as significant on the the due process issue is the fact that no competent evidence from which a lack of moral integrity could be found was ever introduced. The sole item of proof against Trap Rock, Inc. was the indictment of Michael A. Stavola. The Commissioner accepted the indictment in evidence for the "facts" it contained and failed to call any live witnesses which the Corporation could confront and cross-examine.

This Court in *United States v. Costello*, 350 U.S. 359 (1956) held that the Fifth and Fourteenth Amendments

require only that a grand jury must be legally constituted and unbiased. *Costello* established the rule that the quality of the testimony and proofs placed before the grand jury is irrelevant on the question of the validity of indictment. Thus, no rule exists which controls the type of material submitted to a grand jury upon which an indictment may be returned. The prosecutor may obtain an indictment on "evidence" which may or may not be proper. The Commissioner of Transportation had no way of knowing what the grand jury which indicted Michael J. Stavola considered and could not have obtained the grand jury minutes himself due to the secrecy requirement. His attempt to obtain the minutes was met with an objection that he was not a proper party. Initially a trial judge granted permission to inspect the minutes, but this order was vacated with the consent of the Commissioner prior to judicial review. Clearly, the Commissioner was not legally justified in seeking the minutes under the instant circumstances. See, *e.g. In Re Holzcachka*, 317 F.2d 834 (7th Cir. 1963); *Application of State of California*, 195 F. Supp. 37 (E.D. Pa. 1961).

It cannot be doubted that the ultimate result complained of herein was bottomed upon acceptance of the facts charged in the indictment. This acceptance runs counter to the clearly expressed law that an indictment has absolutely no evidentiary value or significance and in no way constitutes proof of or raises the presumption that any of the charges made therein are true. *State* v. *Orecchio*, 16 N. J. 125, 132, 106 A. 2d 541, 544 (1954). This Court has stated that an indictment "does not constitute proof of the commission of the offense." *Tot* v. *United States*, 319 U. S. 463, 466 (1943).

The Commissioner, a layman, in his Determination did not follow the clearly stated rule of *Tot; supra*, and

*Ogcchio, supra,* but chose to rely upon a quotation from *Corpus Juris Secundum* which does not purport to set forth the law of New Jersey. In addition he disregarded the presumption of innocence which clothes all persons indicted until the finder of facts has been satisfied beyond a reasonable doubt that the charges set forth are true.

The New Jersey Supreme Court in its opinion states that an indictment means that "a basis exists to believe the charge if the evidence on hand is not explained or contradicted." This statement neglects the important consideration that the "evidence on hand" is or may be totally or in significant part not proper legal evidence. But more importantly it sets forth an unprecedented proposition which for the first time shifts to a defendant the burden of proof of his *lack* of guilt and raises the question whether the burden of proof can constitutionally be shifted to a corporation to explain the conduct of an individual named in an indictment.

There can be no doubt that this is the effect of the instant decision which requires that the corporate bidder must come forward to contradict the indictment of the individual admittedly unrelated to any corporate purpose. This leaves the bidder in the untenable position of waiving his previously existing rights under his license to contract with the agency or waiving all of his rights to due process of law with respect to the charges alleged in the indictment. Additionally, it requires that the individual choose either to waive his Fifth Amendment rights or suffer a penalty in the form of having his interests and a business destroyed. Such a choice defies the decisions of this Court which state unequivocally that the exercise of the Fifth Amendment privilege may not be cause for one to incur a penalty. See, *e.g., Spevack*

v. *Klein*, 385 U. S. 511 (1967); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967).

The Commissioner in accepting the contents of the indictment as "facts" put the petitioner and Michael J. Stavola to such a choice. In *Garrity*, Mr. Justice Douglas speaking for the Court said:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. . . ." (385 U. S. at p. 497.)

The choice between loss of livelihood and waiver of valuable, substantial constitutional rights such as the Fifth Amendment right to remain silent is no choice at all. This Court in *Garrity*, *supra*, held that such an option is "a choice between the rock and the whirlpool." 385 U. S. at p. 498; see *Steinberg* v. *Morlo*, 385 U. S. 234, 243 (1966) quoting from *Great Trunk Ry. Co.* v. *Railroad Comm'n*, 277 U. S. 585, 591 (1928); *Garrity* v. *New Jersey*, *supra*, 385 U. S. at p. 498.

The Commissioner in relying upon the contents of the petitioner's "facts" denied to Trap Rock, Inc. its fundamental due process rights to a fair hearing in which it could confront and cross-examine the witnesses against it. The toleration of such administrative action by the New Jersey Supreme Court smacks of the system of star-chamber inquests condemned by Mr. Justice Douglas in *Greene* v. *McElroy*, 360 U. S. 474, 496-501 (1959). It denies to the claimed party the fundamental rights to confront and cross-examine the witnesses arrayed against the party in violation of the due process clause of the Fourteenth Amendment which is given force in the New

Jersey Administrative Procedure Act, N.J.S. 52:14B-10 (a) and which ought have been given constitutional stature in non-federal administrative proceedings by this Court in *Goldberg v. Kelly*, 397 U. S. 254, 262-270 (1970); *Speiser v. Randall*, 357 U. S. 513 (1958); *Willner v. Committee on Character and Fitness*, 373 U. S. 96, 103 (1963). Furthermore, it clearly abridged Michael J. Stavola's Fifth Amendment rights by forcing upon him an improper choice—loss of his business or waiver of his Fifth Amendment rights to remain silent in the face of criminal accusations and to be tried before a jury in a court of law where the State has the burden of proving his guilt. If this choice is exercised in favor of the Fifth Amendment, he suffers a penalty for its exercise. Moreover, at the stage of the proceedings before the administrative agency what more could be said than the plea of not guilty. This deprivation of constitutional rights flows directly from the violation of Trap Rock, Inc.'s right to due process of law by the use of a mere indictment as evidential of the allegations contained therein and requiring Trap Rock to satisfactorily explain the allegations.

It is submitted that the Commissioner's determination, affirmed by the New Jersey Supreme Court, clearly and unequivocally violated Trap Rock, Inc.'s rights to due process of law under the Fifth and Fourteenth Amendments of the Federal Constitution. These violations took two distinct forms—the imposition of a loss of the corporation's bidding prequalification on a ground never set forth in any statute or rule, and the imposition of such a sanction following a sham hearing in which the corporation could not confront and cross-examine the witnesses against it inasmuch as the sole evidence introduced against the corporation was a mere naked indictment erroneously accepted by the Commissioner for the "facts"

alleged. Therefore, the petitioner prays that this Court grant their petition for a writ of *certiorari* to bring the decision of the New Jersey Supreme Court before this Court to review the violation of Trap Rock, Inc.'s most fundamental rights to due process of law. The substantial constitutional rights raised herein affect all businesses and persons whose operations fall within the ambit of the ever-proliferating state administrative agencies which exercise the power of life and death over businesses such as the petitioner. It is further submitted that this Court's requirement of due process of law in administrative proceedings both state and federal, has been erroneously ignored by the New Jersey Supreme Court, resulting in a substantial loss to the petitioner. Thus, the writ of *certiorari* should be granted to review the substantial claims of denial of due process of law.

## II

Bills of attainder, prohibited by Article I § 10 of the Constitution are those legislative acts which inflict punishment on named individuals or members or an easily ascertainable group without a judicial trial. *United States* v. *O'Brien*, 391 U. S. 367 (1968).

It is submitted that the action of the New Jersey Commissioner of Transportation in permanently suspending the bidding privilegification of Trap Rock, Inc. on a ground set forth neither in statute nor rule effectively caused that corporation to suffer under an administrative action which amounted to a bill of attainder. This is so because the corporation was caused to suffer a penalty—the loss of its license to bid; see *United States* v. *Lovett*, 328 U. S. 303 (1946)—as a result of the finding by the Commissioner that a certain state of facts never before

set out in statute or rule as prohibited conduct was in fact prohibited, that the corporation was thus guilty, and consequently that a loss of the bidding prequalification was required. *See United States v. Brown*, 381 U. S. 437 (1965).

Mr. Justice Douglas in his concurring opinion in *Peters v. Hobby*, 349 U. S. 331 (1955) stated that an administrative agency, a creature of the legislature, could not exercise powers forbidden to the legislature. 349 U. S. at p. 352. In the *Peters* case, Mr. Justice Douglas was dealing with Art. I § 9 which prohibits Congress from passing bills of attainder. In the matter at bar the subject provision of the Constitution is Art. I § 10 which generally prohibits the States from imposing bills of attainder. Thus, whether or not the complained of act of the Commissioner is legislative, he being an official arm of the State of New Jersey whose office was created by the New Jersey legislature is constitutionally barred from imposing on any person a bill of attainder. *See also Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 144-145 (1951) (Mr. Justice Black, concurring).

In discussing bills of attainder in another case, Mr. Justice Douglas said:

> "... 'A bill of attainder,' wrote Mr. Justice Field for the Court, 'is a legislative act which inflicts punishment without judicial trial.' *Cummings v. Missouri*, 4 Wall. 277, 323 (1867)] and see *United States v. Lovett*, 328 U. S. 303, 317, 318, (1946). The Court held that deprivation of the right to follow one's profession is punishment. 'A bill of attainder usually declared the guilt; here they assumed the guilt and adjudged the punishment conditionally. ... they deprived the parties of their

> right to preach and to practice law unless the presumption were removed by the expurgatory oath. That was held to be as much a bill of attainder as if the guilt had been irrevocably pronounced. . . ." (*Garner v. Board of Public Works*, 341 U. S. 716, 733-735 (1951) (Mr. Justice Douglas, dissenting).)

In the matter at bar, Trap Rock, Inc. is deprived of its prequalification to bid by the Commissioner's act of declaring that the Corporation is in violation of a standard for prequalification of which it never had notice inasmuch as the standard is not set forth in any statute or rule. By invoking such a non-existent standard the Commissioner has, by *fiat* inflicted a penalty upon the corporation without a judicial trial, for the standard in question, which was specifically created for the facts existing with respect to Trap Rock, Inc., requires the infliction of the penalty which resulted.

Where the individual to be punished is clearly identified and the fact of punishment in the absence of a judicial-type trial where the requisites of due process are observed is clear, the existence of the bill of attainder cannot be doubted. *United States v. O'Brien*, 391 U. S. 367, 383 at n. 10 (1968).

In addition, there is a further fact which brings into play the bill of attainder prohibition. As stated by Mr. Chief Justice Warren in *United States v. Brown*, 381 U. S. 437, 441 (1965), a bill of attainder generally carried with it a "corruption of blood" which inflicted penalties on the heirs of the attainted party. In the matter at bar the Commissioner's action directed at the corporate entity Trap Rock, Inc. was based upon its principal shareholder having been indicted. The effect of the permanent suspension of Trap Rock, Inc.'s bidding prequalification is

of necessity felt not only by the corporation, its other shareholders and its creditors but also by Michael J. Stavola, the indicted party. Thus, the disqualification of Trap Rock, Inc. by the Commissioner in effect carries a "corruption of blood" penalty that flows through the veins of the body corporate and punishes the interests which form its constituent parts because of the attainder raised by Commissioner.

Such an intolerable result clearly brings the Commissioner's action within the ambit of the constitutional prohibition contained in the attainder clause of Art. I, § 10.

It is submitted that the Commissioner's permanent suspension of Trap Rock, Inc. raises an important and substantial issue under the clause of the Constitution prohibiting the States from imposing bills of attainder, Art. I § 10. Therefore, this Court should grant the within petition for a writ of *certiorari* to resolve this matter consistent with the Constitution and with the decisions of this Court.

## CONCLUSION

The situation currently existing in the State of New Jersey is such that various procurement agencies of the State are suspending and debarring corporations whose very existence depends upon public contracting without any statutes, rules or regulations governing the concept of moral integrity, the standards by which the conduct of an individual may be imputed to a corporate bidder, and without any time periods for suspension or debarment, although the Attorney General of New Jersey has publicly indicated that he will either recommend to the Legislature the enactment of appropriate statutes or have the Administrative Agency through its rule making power

establish standards and procedures relating to the doing of business in the field of public bidding with the State. The administrative actions to date are such that no corporation engaged in sealed public bidding can fairly or properly comprehend the procedures and circumstances under which it may be subject to administrative reprisal. The instant matter exemplifies the court engaging in a case-by-case development of regulations without regard to the fundamental rights of the corporation and its stockholders, employees and creditors. This case presents actions of an individual totally unrelated to any corporate purpose or the performance of public contracts being imputed to Trap Rock on the sole basis of the percentage of stock held by the individual and without consideration of the factual basis of the indictment or the economic facts of life relating to the corporate entity.

It is submitted that the Supreme Court of New Jersey by affirming the Determination of the New Jersey Commissioner of Transportation which permanently suspended Trap Rock, Inc. upon a heretofore unstated ground upon the sole basis of a naked indictment returned against a stockholder and in the absence of statutes, rules or regulations establishing standards and procedures as well as giving notice of consequences of prohibited conduct is at variance with the well-settled and applicable decisions of this Court under the due process clause of the Fourteenth Amendment and the prohibition of bills of attainder contained in Art. I, § 10. Thus, the corporation has been deprived of its license to do business without due process of law and has been caused to suffer under administrative action, affirmed by the New Jersey Supreme Court, which violates the prohibition against bills of attainder. Therefore, for all of the reasons set forth herein it is submitted that there are special and important reasons

for this Court to grant the petition for the writ of *certiorari*.

Respectfully submitted.

SCHAPIRO, STEINER & WALDER,
*Attorneys for Petitioner Trap Rock Industries, Inc.*
By: JUSTIN P. WALDER,
A Partner of the Firm.

JUSTIN P. WALDER,
*Of Counsel to Petitioners.*

JEFFREY BARTON COHN,
*On the Petition.*

[APPENDICES FOLLOW]

# APPENDIX A

## (Opinion of the Supreme Court of New Jersey, September Term, 1971)

(Filed—November 23, 1971.)

A-41

TRAP ROCK INDUSTRIES, INC., a New Jersey Corporation,

Respondent,

v.

JOHN C. KOHL, Commissioner of Transportation, and JAMES R. SCHUYLER, State Highway Engineer,

Appellants.

A-42

CARMEN OTTILIO, t/a V. OTTILIO AND SONS,

Respondent,

v.

JOHN C. KOHL, Commissioner of Transportation,

Appellant.

Argued September 27, 1971. Decided November 23, 1971.

On appeals from the Superior Court of New Jersey, Appellate Division.

## *Appendix A*

*Trap Rock Industries, Inc.* v. *Kohl* reported at 115 N. J. Super. 278 (App. Div. 1971).

*Mr. George F. Kugler, Jr.*, Attorney General of New Jersey, argued the cause for appellants (*Mr. Stephen Skillman*, Assistant Attorney General, and *Mr. David A. Biederman*, Deputy Attorney General, of counsel; *Messrs. Alfred L. Nardelli, Roger L. Hillman*, and *Courtland T. Babcock, II*, Deputy Attorneys General, on the brief).

*Mr. Justin P. Walder* argued the cause on behalf of respondent Trap Rock Industries, Inc. (*Mr. Jeffrey Barton Cahn*, on the brief; *Messrs. Schapira, Steiner and Walder*, attorneys).

*Mr. Louis Saitzyk* argued the cause for respondent Ottiljo (*Messrs. Kapp, Knoepfel and Toomey*, on the brief).

*Mr. Theodore W. Geiser* argued on behalf of *amicus curiae* New Jersey Heavy, Highway and Construction Industry Advancement Fund (*Mr. Richard D. Catenacci*, on the brief; *Messrs. Hughes, McElroy, Connell, Foley and Geiser*, attorneys).

The opinion of the Court was delivered by

WEINTRAUB, C. J.

The issue before us is whether the State Commissioner of Transportation (herein Commissioner) improperly "suspended" the respondents (herein contractors) from bidding on contracts to be awarded by the Department of Transportation, a principal department of the executive branch of the State government. Both contractors had been "classified" to bid. As will presently appear a stat-

ute provides that prospective bidders shall establish their qualifications prior to bidding rather than after the bids have been received and the low bidder ascertained. In the cases before us, the suspension was based upon the fact that indictments had been returned charging criminal offenses, without proof before the Commissioner affirmatively establishing the criminal allegations. In both cases the contractors declined an opportunity to present evidence concerning the truth of the criminal charges. The Appellate Division held the suspensions were illegal because of the absence of competent evidence establishing the commission of the alleged offenses. *Trap Rock Industries, Inc. v. Kohl*, 115 N. J. Super. 278 (App. Div. 1971); *Ottilio v. Kohl* (not reported). We granted the Commissioner's petitions for certification. 59 N. J. 239 (1971).

As to respondent Trap Rock Industries (herein Trap Rock), the indictment ran against Michael J. Stavola. He owns 80% of the stock of Trap Rock and is its president and chairman of its board of directors. The indictment charged that Stavola conspired with another to bribe and offered a bribe of $5,000 to a member of the New Jersey State Police to intercede improperly on Stavola's behalf with respect to still another indictment charging Stavola with assault and battery upon a police officer and with obstructing the officer in the performance of his duties. Upon learning of the bribery indictment, the Commissioner gave notice to Trap Rock that this criminal charge would, in the Commissioner's opinion, affect the "responsibility" of Trap Rock; that Trap Rock's "classification" was thereby "suspended"; and that Trap Rock was given "an opportunity to be heard on this action" within the ensuing ten days. At the hearing the

indictment was placed in evidence. Trap Rock noted Stavola's plea of not guilty to the indictment but declined to offer any testimony as to the criminal charges. Trap Rock also declined to consent to the examination of the transcript of the grand jury testimony.

Prior to the Commissioner's action, Trap Rock had bid on a job. Subsequently it developed that Trap Rock was the low bidder for that contract. The Commissioner refused to award the contract to Trap Rock. The Appellate Division's judgment would have required the award to be made to Trap Rock. We granted a stay of an award pending the disposition of this appeal.

Respondent Carmen Ottillio is the sole owner of the business he conducts under a trade name, V. Ottilio and Sons. The indictment in his case was returned in the United States District Court for the District of New Jersey. Nine counts charged Ottilio with offering substantial bribes to a special agent of the Intelligence Division, United States Internal Revenue Service, and also with filing false income tax returns, again involving substantial sums of money. As in the case of Trap Rock, the Commissioner notified Ottilio that there were developments since his classification to bid which would affect Ottilio's responsibility, and would authorize the voiding of such classification; that his classification was "suspended," and that an opportunity would be afforded him to be heard on that action. Again, as in the case of Trap Rock, the indictment was introduced into evidence and Ottilio declined to go beyond noting his plea of not guilty in the federal court. Ottilio waived any objection to the Commissioner's examination of the grand jury minutes, but, we gather, the federal authorities would not make them available.

*Appendix A*

The contractors contend the Commissioner's actions violate the provisions of the Administrative Procedure Act and deny due process because (1) the Commissioner did not adopt rules delineating the misdeeds which would disqualify a bidder, and (2) their classifications were suspended on the basis of an indictment alone, without independent proof of the truth of the criminal charges.

I.

These cases do not involve the right to engage in business. The contractors are free to do business with anyone willing to deal with them. The question is whether the State must do business with them despite the Commissioner's view that the public interest would be disserved by doing so. And the question is not whether the Commissioner may bar Trap Rock or Ottilio permanently upon the record in these matters, for the Commissioner went no further than temporarily to suspend their opportunity to seek the business of the Department of Transportation pending a showing that the State's interest would be served by doing business with them notwithstanding the criminal charges.

We start with the premise expressed in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127, 84 L. ed. 1108, 1114-15 (1940), that "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." The State need not resort to competitive bidding. *Cf. Lehigh Construction Co.* v. *Housing Authority of the City of Orange*, 56 N. J. 447 (1970); *Rutgers* v. *Kugler*, 110 N. J. Super. 424 (Law

Div. 1970), affirmed o.b., 58 N. J. 113 (1971). And if the Legislature chooses to direct competitive bidding, it need not mandate an award to the "lowest" responsible bidder but rather may vest in its agent the discretion to accept the bid of "that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered," as the statute provided in *Commercial Cleaning Corp.* v. *Sullivan*, 47 N. J. 539, 548 (1966).

That the State may decide how to procure its needs does not mean that, having chosen a course, the State may pursue it with the abandon of a private consumer. When the State acts, certain restraints attach. So, as frequently noted, the State could not select its suppliers on the basis of religious, racial or ethnic attributes. See *Garden State Dairies of Vineland, Inc.* v. *Sills*, 46 N. J. 349, 355 (1966), same case, 53 N. J. 71 (1968); *cf. Burlington County Evergreen Park Mental Hospital* v. *Cooper*, 56 N. J. 579, 583-584 (1970). Nonetheless the purpose of a procurement program is not to advance the interest of those who want the State's business. On the contrary, the purpose is to serve the State's interest as purchaser.

The purpose of competitive bidding statutes "is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good * * *." *Hillside Township* v. *Sternin*, 25 N. J. 317, 322 (1957).

It, of course, serves the public interest to permit suits to enforce the policy of these statutes. To that end, a taxpayer may sue. So, too, may a bidder who claims to be

entitled to the award. And to the same end, the low bidder is entitled to be heard by the public authority before his bid is rejected. *Commercial Cleaning Corp.* v. *Sullivan*, *supra*, 47 N. J. at 550; *Arthur Venneri Co.* v. *Paterson Housing Authority*, 29 N. J. 392, 402 (1959); *Paterson Contracting Co.* v. *Hackensack*, 99 N. J. L. 260, 261 (E. & A. 1923); *J. Turco Paving Contractor, Inc.* v. *Orange*, 89 N. J. Super. 93, 98-99 (App. Div. 1965); *Sellitto* v. *Cedar Grove*, 132 N. J. L. 29, 32 (Sup. Ct. 1944). The low bidder is sometimes said to have acquired a "status." That he has an interest of some character which will support a claim to be heard cannot be questioned. The point to be stressed is that the interest, whatever its dimensions, is conferred upon him to the end that the public will obtain all that is due it in the procurement process, rather than for his individual aggrandizement. As was said in *Arthur Venneri Co.*, *supra*, 29 N. J. at 402-03, "The requirement of a hearing derives from the basic policy of the bidding laws, *i.e.*, the encouragement of competition, which in turn works to protect the public coffers and prevent chicanery and fraud in public office."

We noted earlier that Trap Rock and Ottilio were "prequalified" for bidding. Under some competitive bidding statutes, the bidder's qualifications are determined after bids are received and the low bidder thus ascertained. There are, however, some situations in which the Legislature has decided that the public interest would be furthered by classifying prospective bidders in advance of bidding. One such statute, N.J.S.A. 27:7-35.1-35.12, applies to the Department of Transportation and is here involved. In brief, section 35.2 requires that all persons who propose to bid on highway work "shall first be classified by the department as to the character and amount

of work on which they shall be qualified to submit bids." Section 35.3 requires a sworn statement in response to a questionnaire prepared by the department which "shall develop fully the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder, and also such other pertinent and material facts as may be deemed desirable." Section 35.6 provides that a dissatisfied applicant "may request in writing a hearing before the prequalification committee." Section 35.8 reads:

> "Nothing contained in this act shall be construed as depriving the State Highway Commissioner[1] of the right to reject a bidder at any time prior to the actual award of a contract, where there have been developments subsequent to the classification of such bidder, which in the opinion of the commissioner would affect the responsibility of the bidder. Before taking final action on any such bid, the commissioner shall notify the bidder and give him an opportunity to present any additional information which might tend to substantiate the existing classification."

We find nothing in this statute to evidence a legislative departure from the basic principle that bidding statutes are intended for the benefit of the taxpayer rather than the bidder or prospective bidder. The statute simply provides, so far as feasible, for a determination of qualification before bidding rather than after the bids are in. The opportunity for hearing afforded by this statute merely

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[1] Now Commissioner of Transportation. N.J.S.A. 27:1A-5.

parallels the right to hearing after the bids are in which the more conventional bidding statutes contemplate. We find no purpose to vest in a preclassified bidder any "right" which derogates the primary right of the State through its Department of Transportation to do business, in the words of N.J.S.A. 27:7-30, with "the lowest *responsible* bidder." (Emphasis ours.)

Thus, the bidder's "rights" remain subordinate to the primary interest of the State as a consumer. We must give ultimate regard to the State's welfare. Trap Rock and Ottilio cannot be accorded any "right" which would subvert the primary objective of the statute, that the State do business with a "responsible" bidder. With this in view, we turn to the propositions they advance.

## II.

It is settled that the legislative mandate that a bidder be "responsible" embraces moral integrity just as surely as it embraces a capacity to supply labor and materials. *Arthur Venneri Co.* v. *Paterson Housing Authority*, *supra*, 29 N. J. at 403; *Mal-Bros. Contracting Co.* v. *Kohl*, 113 N. J. Super. 144, 147 (App. Div. 1971), certif. denied, 58 N. J. 94 (1971); *Kayfield Construction Corp.* v. *Morris*, 15 A. D. 373, 225 N. Y. S. 2d 507, 514 (1st Dept. 1962); 43 *Am. Jur., Public Works and Contracts*, § 42, pp. 784-85. The relevancy of moral responsibility is evident. It heads off the risk of collusive bidding. It assures honest performance. It meets the citizen's expectation that his government will do business only with men of integrity. The question then is whether under the circumstances of these cases the Commissioner could reasonably believe

it was not in the best interest of government to deal with these contractors until the criminal allegations were resolved in some manner. *Cf. Arthur Venneri Co., supra,* 29 N. J. at 402.

We need hardly labor the point that the charges of bribery contained in the indictments would, if established, reveal a lack of moral responsibility for doing business with the State. That the charges do not relate to the performance of a government contract is of no moment; it could not be supposed that a man who would bribe law enforcement officers would bribe no one else.

Nor, as to Trap Rock, does it matter that the indictment runs against Stavola individually and not the corporate entity. Trap Rock urges there is no basis to "pierce the corporate veil." The concept is not relevant. There is no veil to pierce. A corporation, as such, has no moral character. The moral responsibility of a corporation is one and the same with the moral responsibility of the individuals who give it direction. See *Metropolitan Motors* v. *State*, 39 N. J. Super. 208 (App. Div. 1956); *D. B. M. Amusement Corp.* v. *Thourot*, 29 N. J. Super. 462 (App. Div. 1954), certif. denied, 15 N. J. 382 (1954); *George Campbell Painting Corp.* v. *Reid*, 283 N. Y. S. 2d 31; 229 N. E. 2d 602 (Ct. App. 1967), affirmed, 392 U. S. 286, 20 L. ed. 2d 1094 (1968); *Benson Parking Corp.* v. *O'Connell*, 220 N. Y. S. 2d 1010 (Sup. Ct. 1961). And Trap Rock cannot escape identification with Stavola upon the assertion that others handle its day-to-day operations, for Stavola owns 80% of the capital stock and is president and chairman of the board of directors.

The contractors contend the Commissioner was required by statute to specify in rules the factual patterns

which spell out a lack of moral responsibility. We find no such mandate. Neither N.J.S.A. 27:7-35.11 of the preclassification statute, which authorizes the Commissioner to establish "such reasonable regulations as he may deem appropriate for controlling the qualifications of prospective bidders," nor N.J.S.A. 52:14B-3 of the Administrative Procedure Act, which requires each agency to adopt certain rules,[2] can be read expressly to call for a definition of moral responsibility. There are good reasons not to find that requirement by implication. One is that the Legislature could hardly have intended its demand for moral responsibility to lie inert until activated by an administrative rule. Another is that since moral responsibility is common to bidding statutes, it is unlikely the Legislature wanted each agency to assay its own definition. Further the subject defies a cataloguing of all conceivable factual patterns which reveal moral deficiency.

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[2] N.J.S.A. 52:14B-3 reads:

> "In addition to other rule-making requirements imposed by law, each agency shall:
>
> (1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submission or requests;
>
> (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;
>
> (3) make available for public inspection all final orders, decisions and opinions, in accordance with the provisions of chapter 73 of the laws of 1963 as amended and supplemented (c. 47:1A-1 et seq.)"

Finally, no such detailed exposition is needed. Good moral character is demanded in sundry situations without a brochure upon the topic. The standard draws specificity from each setting. So here, the nature of the subject, *i.e.*, doing business with the State as a supplier in its procurement program, itself supplies sufficient concreteness to the concept of moral integrity. The demand is for a party who will compete honestly, and will perform honestly, and whose record does not suggest to the public a lack of that essential integrity. Hence, the standard is adequate; indeed "it is difficult to conceive of a standard which would be both more precise and equally workable." *Elizabeth Federal S. & L. Assn.* v. *Howell*, 30 N. J. 190, 194 (1959).

The contractors rely heavily upon *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D. C. Cir. 1964). There it was held that the Federal Administrative Procedure Act required the agency to spell out the misdeeds which would entail disbarment of a license to participate in certain transactions under the auspices of the Commodity Credit Corporation. There are differences which distinguish that case from ours.

*Gonzalez* does not clearly reveal the nature of the relationship between the Gonzalez corporation and the federal agency. The specific charge was that Gonzalez misused official inspection certificates in the resale in Brazil of surplus beans bought from the Commodity Credit Corporation. The misuse of the certificate resulted in misrepresentation of the condition of the commodity. One of the Gazalezes was indicted and pled guilty to a lesser offense which involved substantially the same factual charge. It is clear that the case did not involve a

procurement program designed to meet the government's own needs as purchaser. Rather the immediate transactions apparently related to the purchase from the government of commodities the government had acquired, as part of a composite program designed for the stabilization, support and protection of farm income and prices, the maintenance of balanced and adequate supplies of agricultural commodities, and the development of foreign markets for such commodities. 15 U.S.C.A. § 714 and 714c(f). We gather that the debarment of the Gonzalez corporation would have ended its business of reselling surplus commodities in other countries.

Thus *Gonzalez* did not involve the question whether the federal government would be compelled to procure its needs from normally unfit suppliers unless the manifold ingredients of the unfitness syndrome were anticipated in some detailed fashion. At most *Gonzalez* involved the sale of a commodity by the government and its resale elsewhere. More importantly, Gonzalez was not debarred on an allegation that he lacked relevant moral responsibility to do business with government. Rather the court there dealt with the case on the premise that debarment was based exclusively upon the doing of *a specific act*, the misuse of an inspection certificate, and hence *Gonzalez* stands for the view that if a *specific act* is itself to be sufficient grounds for debarment, the agency should prohibit the act by rule and announce that a violation could itself lead to such consequences. We do not read *Gonzalez* to mean that the moral responsibility which government demands of those who would like to supply its needs must be defined in terms of detailed acts or omissions, failing which government must accept a bidder, however lacking he may be in integrity. Indeed, *Gon-*

*Gale* found it implicit that dishonesty would justify debarment, 334 F. 2d at 576-77. It would seem incongruous to say that although honesty is so vital that it is an implied requisite, a lack of it will not be a bar unless an administrator states in advance what acts or omissions cannot be reconciled with that trait.

We should add that if we read our statute to contemplate that the Commissioner must adopt a rule spelling out the sundry acts or omissions which could lead to a finding that moral responsibility was lacking, we could not say the Legislature intended that the Commissioner's failure to do so would require a contract to be made with someone morally unfit for the State's business. The purpose of the bidding statute being to guard the State's interest rather than to advance a bidder's, that result would defeat the very purpose of the enactment.

Defendants say that if the statute is not read to require an itemization of acts and omissions which will support a finding of a lack of moral responsibility, there is a denial of due process of law. We are satisfied that due process does not require that the State, in its role as a purchaser, must thus canalize the discretionary power of its agents to protect the public interest in this area, and indeed at the pain of being compelled to contract for its needs with a bidder who is unfit. In this setting, the requirement of moral responsibility, as spelled out in judicial decisions, is constitutionally sufficient. It denies nothing that is due one who would like to compete for the State's business. A would-be bidder could hardly say he became morally irresponsible because no one defined the term for him. Nor does the standard invite or permit the kind of invidious treatment which

we mentioned above in discussing possible limitations upon the doctrine of *Perkins v. Lukens Steel Co., supra*, 310 U. S. 113, 84 L. ed. 1108, that government, like private individuals and businesses, "enjoys the unrestricted power * * * to determine those with whom it will deal."

III.

The contractors next contend the hearing accorded them did not comport with the Administrative Procedure Act. More precisely, they say that when they were classified for future bidding, they acquired a "license" within the meaning of N.J.S.A. 52:14B-2(f), which defines the word[2] and therefore they are protected by N.J.S.A. 52:14B-11 which provides that no agency shall revoke or refuse to renew a license unless the agency "has first afforded the licensee an opportunity for hearing in conformity with the provisions of this act applicable to contested cases"; that the hearing here involved did not meet the demands of N.J.S.A. 52:14B-10, which deals with hearings in "contested cases"; and that an indictment, not being proof of its own allegations, cannot itself sustain a revocation.

The contractors point out that it was held in *Mal-Bros. Contracting Co. v. Kohl, supra*, 173 N. J. Super. at 147, that the Administrative Procedure Act applied to the debarment of a bidder by the Commissioner. We accept that proposition provided it is kept in mind in applying the statute that the so-called "license" exists to further

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[2] License, as there defined, "includes the whole or part of any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law."

the State's interest as a purchaser rather than to vest in the bidder some right at the expense of that public interest. Expressed another way, the Administrative Procedure Act should not be read to deny to a purchasing agency the procedural latitude necessary to protect the public interest which the bidding process was intended to secure. We repeat that we are not dealing with a license to engage in a contracting business. The contractors are free to do business with anyone willing to deal with them. The claimed right here is to compel the State to do business with them.

And the question before us is not whether an indictment may support a final order debarring a bidder. Unlike *Mal-Bros., supra*, the present proceeding did not seek that final result. The purpose here was to *suspend*, pending resolution of the criminal charges.

An indictment of course is not proof of its own allegations in the criminal trial itself, *see State v. Orecchio*, 16 N. J. 125 (1954). In the criminal trial, the indictment is the very charge to be made out, and it would deny the accused's right of confrontation to give the indictment any evidential value whatever. But this is not to say that an indictment is nothing at all, even within the criminal process. The indictment will suffice to warrant the arrest of the accused and to hold him to or even without bail. For an indictment, far from being a mere allegation, constitutes a finding by a grand jury that a basis exists for subjecting the accused to a trial, with the intermediate restraints upon his freedom we just mentioned.

Under our practice the grand jury is instructed:

> "* * * After you have heard the evidence, you are to decide whether a *prima facie* case has been

made out. This means whether the State has presented evidence, which if unexplained or uncontradicted, would carry the case to a jury and justify the conviction of the accused."

Thus, with respect to Trap Rock, the indictment constitutes such a hearing as to its principal, Stavola. "The federal indictment of Ottilio undoubtedly means no less. Although the term "probable cause" seems to be used in the federal courts, *Hall, Kamisar, LaFave, and Israel, Modern Criminal Procedure* (3d ed. 1969), pp. 793-794; 8 *Moore, Federal Practice* (2d ed.) § 603[2], p. 6-14; 1 *Wright, Federal Practice and Procedure* (1969) § 110, p. 198, it probably means a "*prima facie*" case rather than the less exacting "probable cause" which will justify a search. *State* v. *Burnett*, 42 N. J. 377, 386-88 (1964); *State* v. *Davis*, 50 N. J. 16, 23-24 (1967). Whatever the meaning of "probable cause" in this context, the federal indictment imports the existence of facts sufficient to subject a defendant to trial and to the intermediate deprivations already mentioned.

An indictment, State or federal, is hardly a neutral fact for all purposes. In the area of our present concern, it cannot be said that an indictment has no meaning. On the contrary, the indictment means that a basis exists to believe the charge if the evidence on hand is not explained or contradicted. And if the charge against the contractor is true, his lack of responsibility is a present fact. A conviction thereafter will merely evidence that the disqualifying attribute did exist.

The question is whether the Legislature intended the State's agency to enter into contracts with a would-be

contractor in the face of a grand jury's finding that there is a *prima facie* basis for a belief that the contractor is presently unfit for the job. We are satisfied the Legislature did not intend that course. The alternatives then are but two—a suspension pending the resolution of the criminal charge or an immediate trial by the agency itself of that charge. To require the agency to try the criminal charge would not be appropriate. The evidence might not be available to the agency, and if it were, the right to a fair trial in the criminal case might be infringed by the prior trial and decision in the administrative hearing. The remaining course is the one pursued here, of immediately suspending the bidder's classification, coupled with an opportunity to the bidder to come forward, if he can, with any showing from which the agency could find it would not disserve the public interest to contract with him notwithstanding the grand jury's finding of a *prima facie* basis for the disabling criminal charge.

We have consistently recognized an implied power in the State and its subdivisions to suspend its employees or officers pending disposition of indictments or other charges where the public interest so requires. *Russo* v. *Walsh*, 18 N. J. 205, 212 (1955); *De Marco* v. *Bergen County*, 21 N. J. 136, 139, 145 (1956); *Winne* v. *Bergen County*, 21 N. J. 311 (1956); *Romanowski* v. *Board of Education*, 89 N. J. Super. 38, 40-41 (App. Div. 1965). The same public interest should justify a refusal to engage a contractor pending resolution of a criminal charge which, if true, would disqualify. Nor does it improve the contractors' position to say the preclassification procedure described above constitutes them "licensees," for the license is no more than a license to seek contractual relations with the State.

Indeed, even with respect to licenses to engage in a business or activity, it is generally said to be implicit that a suspension may be ordered pending investigation when the public interest so requires. *Davis, Administrative Law Treatise* (1958), § 7.08, pp. 438-444, 1970 Supp. § 7.08, pp. 331-333; *Gellhorn & Byse, Administrative Law* (4th ed. 1960), pp. 764-767; *see Bechler v. Parsekian*, 36 N. J. 242 (1961). The fact of an indictment for crime has been held an adequate basis for an immediate suspension, *Halsey Stuart & Co. v. Public Service Commission*, 212 Wis. 184, 248 N. W. 458 (1933), and for the rejection of a low bid for public work, *Zara Contracting Co. v. Cohen*, 23 A. D. 718, 257 N. Y. S. 2d 118 (3d Dept. 1965). In *Gonzalez v. Freeman*, *supra*, 334 F. 2d 570, upon which the contractors rely heavily in other respects, the licensee did not challenge the power of the Secretary of Agriculture to suspend the license temporarily even in advance of an indictment (pp. 573, 579). What was there under attack was a final order in a debarment proceeding.

The classification statute itself recognizes a power to reopen the subject of a contractor's qualification on the basis of new information. N.J.S.A. 27:7-35.8 provides:

> "Nothing contained in this act shall be construed as depriving the State Highway Commissioner [now Commissioner of Transportation] of the right to reject a bidder at any time prior to the actual award of a contract, where there have been developments subsequent to the classification of such bidder, which in the opinion of the commissioner would affect the responsibility of the bidder. Before taking final action on any such bid, the commissioner shall notify the bidder and give him an

> opportunity to present any additional information which might tend to substantiate the existing classification."

The Administrative Procedure Act does not negate that power. N.J.S.A. 52:14B-11 of that act reads in part:

> "* * * Any agency that has authority to suspend a license without first holding a hearing shall promptly upon exercising such authority afford the licensee an opportunity for hearing in conformity with the provisions of this act."

Thus, granted that the classification to bid conferred a "license" to do business with the State, the Administrative Procedure Act did not bar the Commissioner's temporary suspension.

For these reasons we cannot say the Commissioner acted unreasonably when he suspended the classifications for bidding on the basis of the indictments. It was appropriate, and sufficient, to offer the contractors an opportunity to explain away the criminal charges to obviate the temporary suspension. There, of course, is a right to a further hearing with respect to debarment. It is only a temporary suspension that is before us, and it is as to that action that we find the proffered hearing was appropriate and sufficient.

The contractors point out that if they are ultimately vindicated, they will be unable to recoup profits they might have made under contracts with the State,[4] and add that

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[4] Absent statute, public officers suspended because of an indictment are also without remedy even though acquitted on the trial of the indictment. See *DeMarco* v. *Bergen County*, *supra*; 21 N. J. at 140-144; *Winne* v. *Bergen County*, *supra*, 21 N. J. at 315-16.

in fact they have heretofore relied heavily upon public work. We are mindful that such losses cannot be recovered, but the bidding structure, we repeat, is for the benefit of the public, and we see no basis for differentiation among prospective bidders on the basis of the volume of their public contracts. The economic problem must remain theirs. It lies with them to do what they can to alleviate their situations. They might on that account accept the opportunity offered by the Commissioner to explain away the criminal charges, or they might decide to press for a prompt trial of the indictments. But we see no sound basis to compel the State to do business with a person when his responsibility is thus questioned by an indictment.

The contractors say that a temporary suspension, even if consistent with our statutes, nonetheless offends due process of law. We think the considerations already discussed dispel a claim of fundamental unfairness. We are not referred to any case holding the other way.

The power of government to debar a bidder pending a later hearing was recognized in *Goldberg* v. *Kelly*, 397 U. S. 254, 25 L. ed. 2d 287 (1970). There five members of the Court held that welfare recipients could not be removed from the rolls until after an appropriate hearing with respect to their continued eligibility to receive aid. The majority, however, recognized that "some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing." 397 U. S. at 263, 25 L. ed. 2d at 296. In footnote 10 at the page just cited, the majority noted that in *R. A. Holman & Co.* v. *SEC*, 299 F. 2d 121, 131 (D. C. Cir. 1962), *cert. denied*, 370 U. S. 911, 8 L. ed. 2d 404

(1962), the Court of Appeals said that "In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." As an "example," footnote 10 cites "Gonzalez v. Freeman, 118 U. S. App. D. C. 180, 334 F. 2d 570 (1964) (disqualification of a contractor to do business with the Government)." The reference, of course, is to the *Gonzalez* case we have already discussed. In holding that a pretermination hearing was required as to continued welfare eligibility, the majority in *Goldberg* v. *Kelly* stressed the extreme need of the individual and found that important governmental interests were concurrently advanced by such a pretermination hearing. In discussing the essential needs of the welfare recipient, the majority noted that that "factor" was "not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended." 397 U. S. at 264, 25 L. ed. 2d at 297. These observations support our view that there is no serious basis for a due process claim in the cases before us.

One matter remains. It will be recalled that after the suspension Trap Rock was found to be low bidder on bids theretofore submitted. The question is whether a distinction can be drawn between the right of Trap Rock to bid and its right to receive an award under bids already in. We see no basis for a distinction. The public interest in the State's contracts is no less demanding because bids have been submitted. N.J.S.A. 27:7-35.8 expressly contemplates rejection of a bid on the basis of de-

velopments after prequalification. It follows that in such circumstances the procuring authority, after giving the low bidder such opportunity to dissipate the impact of the indictment as the public need will permit, may, upon the low bidder's failure to do so, make an award to the next low bidder.

The judgments of the Appellate Division are reversed and the actions of the Commissioner are affirmed, without prejudice, of course, to the right of the contractors to a hearing with respect to final debarment when such a hearing becomes feasible.

## APPENDIX B

### Opinion of the Superior Court of New Jersey, Appellate Division

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TRAP ROCK INDUSTRIES, INC., a New Jersey corporation,

Appellant,

*v.*

JOHN C. KOHL, Commissioner of Transportaiton, and James R. Schuyler, State Highway Engineer,

Respondents.

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Superior Court of New Jersey,
Appellate Division.

Argued June 15, 1971.

Decided June 30, 1971.

Before Judges KILKENNY, HALPERN and LANE.

The opinion of the court was delivered by KILKENNY, P.J.A.D.

On May 7, 1971 the State Commissioner of Transportation made a determination that "Michael J. Stavola/Trap Rock Industries, Inc., be suspended from bidding until satisfactory explanations for the items contained in the indictment are adduced to satisfy this Department that Michael J. Stavola/Trap Rock Industries, Inc. possess the moral integrity to qualify as a bidder."

*Appendix B*

Trap Rock Industries, Inc., prosecutes this appeal from that administrative determination. This company is a contractor and had been prequalified with the Department of Transportation prior to the above suspension.

The indictment referred to in the order of suspension, a copy of which was attached to the Commissioner's determination, charged that Michael J. Stavola and Joseph Martinelli, between October 19, 1970 and March 17, 1971, did in four-named municipalities in New Jersey, conspire in violation of N.J.S.A. 2A:98-1 and 2A:98-2 to commit three specified crimes. The purported crimes constituting the basis of the alleged conspiracy all related to efforts made by Stavola and Martinelli to (1) induce Detective James Sweeney of the New Jersey State Police to intercede for Michael J. Stavola, defendant in a pending indictment for assault and battery upon a police officer, in violation of N.J.S.A. 2A:85-1 and 2A:85-14; (2) offer a bribe to Defective Sweeney in the same matter, and (3) obstruct justice by Sweeney's endeavours to obtain a favorable disposition of the police officer assault and battery indictment.

The second count of the indictment charged the same defendants, in relation to the same matter, with violations of N.J.S.A. 2A:85-1, 2A:85-5 and 2A:85-14. The third count charged attempted bribery of Detective Sweeney for the same purpose, in violation of N.J.S.A. 2A:85-1 and 2A:85-14. The fourth count charged an obstruction of justice, all in relation to the same subject matter, contrary to N.J.S.A. 2A:85-1 and 14. In brief, the four-count indictment involves the same subject matter, but charges the alleged offense in various aspects.

## *Appendix B*

Trap Rock Industries, Inc., and Michael J. Stavola, its principal officer and stockholder, were notified by the Commissioner and given an opportunity to present any additional information at a hearing which might tend to substantiate the existing classification of being a "responsible" bidder. Stavola denied the charges set forth in the indictment but declined to elaborate thereon.

At the hearing no proof was received by the Commissioner as to the truth of the recitals in the indictment. The minutes of the grand jury were not disclosed to or examined by the Commissioner.

In brief, disqualification from bidding has been visited by the Commissioner upon this corporate public contractor solely on the basis of the indictment itself against its principal officer and 80% stockholder and Stavola's failure to explain satisfactorily and justify the unproven recitals in the indictment. There is no question as to the competency of Trap Rock Industries, Inc. to perform any public contract which might be awarded to it. The company has the equipment, the experience, the supervisory and other personnel, financial stability and ability to post any required performance bond, all as demonstrated by a previous determination of qualification.

The reason for suspending the right to bid and enter into a contract with the State for public work is the Commissioner's determination that the indictment, not satisfactorily explained away at an administrative hearing, is sufficient evidence of a lack of "moral integrity" to deprive one of being classified as a "responsible" bidder.

We pass the issue of whether a corporate entity may be deemed lacking in moral integrity, if its principal

officer and controlling stockholder, a separate legal entity, is justifiably found to be lacking in moral integrity. We shall assume in this case, as did the Commissioner, that protection of the public interest warrants a "piercing of the corporate veil."

So, too, we proceed upon the correctness of the rule laid down by us in Mal-Bros. Contracting Co. v. Kohl, 113 N. J. Super. 144, 147, 273 A. 2d 357 (App. Div. 1971), certif. den. 58 N. J. 94 (1971), that determining the meaning of "responsible," when related to a bidder for a public contract, embraces the factor of "moral integrity." But *Mal* is factually distinguishable. There, we found that "there was substantial competent and relevant evidence in the record to support the Commissioner's finding of a lack of moral integrity on the part of Mal." *Ibid.* We specified the three principal items supporting that conclusion. We particularly noted in *Mal* (at 147, 27 A. 2d at 359), "The Commissioner's determination was not based on hearsay or other improper evidence."

[1] In the instant case the Commissioner's determination is based essentially, if not entirely, upon the hearsay recitals in the indictment, which in turn depend for their reliability upon grand jury testimony of a witness or witnesses whose credibility has not been tested.

The Commissioner relies upon the policy of administrative suspension of public employees upon return of indictments against them, citing De Marco v. Board of Chosen Freeholders of Bergen County, 21 N. J. 136, 121 A. 2d 396 (Sup. Ct. 1956). The suspension of a police officer without pay pending favorable disposition of the indictment against him is distinguishable from the suspension of a contractor from bidding on public work.

*Appendix B*

When cleared and reinstated the police officer is entitled to reimbursement for his lost wages. But how is the disqualified contractor to be reimbursed when and if he is cleared? Then, too, there are the irretrievable losses suffered perhaps by his employees. It is alleged that Trap Rock Industries has from 500 to 800 employees and its average weekly payroll ranges from $110,000 to $125,000. In addition, there is the loss through lack of use of equipment.

[2] The Commissioner recognized that an indictment is evidence only of the fact that a charge has been made; it in no wise establishes the truth of the charge or the presence of sufficient legal proof thereof. It is not uncommon for entirely innocent persons to be indicted. State v. Orecchio, 16 N. J. 125, 132, 106 A. 2d 541 (1954). The presumption of innocence is deeply ingrained in our law. It is worthy of recognition before a State administrative agent as it is in a court of criminal justice. Stavola and the corporation, Trap Rock Industries, Inc., were entitled to application of that principle in the instant situation.

The determination of the Commissioner suspending Stavola Trap Rock Industries, Inc., from the classified list of "responsible" bidders, is reversed and the Commissioner is directed to reinstate them to their former "qualified" position.

# APPENDIX C

## Determination of the Commissioner

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION
HEARING ON QUALIFICATION CLASSIFICATION

JOHN C. KOHL
Commissioner

---

IN THE MATTER OF

MICHAEL J. STAVOLA/
TRAP ROCK INDUSTRIES, INC.

---

This matter has been brought before the Department of Transportation under N.J.S.A. 27:7-35.8 and the general powers of the Commissioner under Title 27.

Trap Rock Industries, Inc. is a contractor who has been pre-qualified with the Department of Transportation since 1971.

Subsequent to the classification of the above contractor, information regarding developments in an investigation of Michael J. Stavola, the principal officer and controlling stockholder of Trap Rock Industries, Inc., being conducted by the Attorney General of New Jersey, Division of Criminal Justice, was received by this Department

which was deemed to be of such a nature as to affect the responsibility of Michael J. Stavola Trap Rock Industries, Inc. The information received was:

1. An indictment has been returned by the State Grand Jury against Michael J. Stavola in four counts, alleging bribery of a State officer. N.J.S. 2A:85-1; N.J.S. 2A:84-14; N.J.S. 2A:98-1; N.J.S. 2A:98-2. Rather than set forth the indictment, a copy of same is attached hereto and made part hereof as Exhibit A, annexed. Based on this information, the Department of Transportation determined that this development could affect the contractor's responsibility as a bidder. Accordingly, the contractor was notified, through its attorney, that a hearing regarding the affect of this development on its bid qualification classification, would be held on April 22, 1971, postponed to May 6, 1971

A hearing before the Department, the Honorable John C. Kohl, Commissioner, presiding, was held on May 6, 1971. At this hearing, the contractor was provided the opportunity to present any information which might have tended to substantiate its existing classification. At this hearing, a copy of the State Grand Jury indictment was introduced. The contractor's response was to categorically deny the allegation contained in the indictment by presentation of his plea of Not Guilty to all charges, including the overt acts specified in the indictment. The contractor was requested to respond to the indictment or in the alternative, answer questions pertaining thereto. Through counsel, he refused to do so, relying on his Not Guilty plea to the indictment. Contractor was asked, through its counsel, to consent to a release and examination of the Grand Jury records in an attempt to ad-

duce a further detailed explanation concerning the allegation in the indictment. It is recognized that Mr. Stavola did not appear before the Grand Jury and had no opportunity to rebut the witnesses presented before the Grand Jury. The opportunity to do this has been afforded him at the hearing before the Department. He refused, however, to do this. Prior to this proceeding, this Department, through its counsel, had sought to secure the Grand Jury records. In the face of argument by Mr. Stavola's counsel that it would prejudice his client perhaps in a criminal case, the Department withdrew its attempt to secure the Grand Jury records through court proceedings. It was explained that securing the Grand Jury records would merely have afforded a more detailed explanation concerning the allegations in the indictment and would have given the contractor an opportunity he did not have before the Grand Jury to rebut same. Nevertheless, contractor refused to do so. It was stipulated that Mr. Stavola is indeed the controlling stockholder of the contract corporation, owning 80% of the stock in said company. He is also Chairman of the Board of Directors and President of the company, which, by the company's by-laws, makes him the controlling principal officer of the company. It was further stipulated that the contractor could have and would have, if allowed, produced affidavits for testimony from various individuals as to the moral and ethical character of Mr. Stavola. Counsel for the contractor objected to the original notice sent to the contractor as not being in compliance with the Administrative Procedures Act of 1968. That original notice was sent to the contractor on March 29, 1971. Due notice was afforded, through the attorney for the contractor, as to the specific basis upon which the hearing

would be heard and indeed reference to the specific precedent upon which this Department replied in temporarily suspending the contractor pending hearing was presented in a petition served upon contractor in connection with the attempt to obtain the Grand Jury minutes on April 22, 1971.

Therefore, I find as follows: The facts alleged in the indictment against Michael J. Stavola, Criminal Indictment No. 1194-69, and SGJ 5-71-3, Superior Court of New Jersey Law Division—Criminal, have not been satisfactorily explained or the actions of the principal of Trap Rock Industries, Inc., Michael J. Stavola, who is involved therein justified. Michael J. Stavola is the controlling stockholder and controlling officer of the company by virtue of his holding 80% of the stock and being President and Chairman of the Board of the company. Under these circumstances and in the context of this matter, his corporate "veil" is no defense. Michael J. Stavola is Trap Rock Industries, Inc. *Brownell v. Shearing*, 129 F. Supp. 879 affm'd. 228 Fed. 2d 624 cert. denied 351 U. S. 954 (1956). *Hill Dredging Corp.* v. *Risley*, 18 N. J. 501, 114 Atlantic 2d 697, (1955). *Pomeroy v. Simon*, 17 N. J. 59 110 Atlantic 2d 19 (1954). The corporation is obviously required to act in all business matters in accordance with the will of this particular shareholder and officer. *Brownell* v. *Shearing*, 129 F. Supp. 879 affm'd. 228 Fed. 2d 624 cert. denied 351 U. S. 954 (1956).

It has long been the law of this State that the moral integrity and moral worth of the bidder is critical to an evaluation of his qualification to bid. *Arthur Venneri Co.* v. *Paterson Housing Authority*, 29 N. J. 392, 403 (1959). In that case, *Venneri* had been placed on a dis-

qualification list by the Public Housing Administration for giving a gratuity to a government contracting officer in the hope of securing favorable treatment. The New Jersey Supreme Court upheld the rejection by the Paterson Housing Authority of a low bid by *Venneri* because of the Federal disqualification. At page 403, the court noted that "[a]lthough responsibility may involve experience, financial ability and facilities necessary to perform the contract . . . it may also involve moral integrity of the bidder." Other jurisdictions have also applied this rule. *Koich* v. *Crar*, 111 Mont. 463, 110 P. 2d 964 (1941); *Williams* v. *City of Topeka*, 85 Kans. 857, 118 Pac. 864 (1911); *Kayfield Construction Corp.* v. *Morris*, 15 A.D. 2d 373, 225 N.Y.S. 2d 507 (App. Div. 1962); *Dairymen's League Cooperative Association, Inc.* v. *Perrini*, 54 Misc. 2d 400, 282 N.Y.S. 2d 887 (Sup. Ct. 1967); *Application of Limitone*, 21 Misc. 2d 376, 189 N. J. S. 2d 738 (Sup. Ct. 1959); *Picone* v. *City of New York*, 176 Misc. 967, 29 N.Y.S. 2d 539 (Sup. Ct. 1941). Indeed this Department knows of no cases which do not follow the rule as set forth by the New Jersey Supreme Court in *Venneri*, *supra*.

*Dairymen's League Cooperative Association, Inc.* v. *Perrini*, *supra*, is particularly apposite to the fact situation under consideration. There, the petitioner was the low bidder for a New York City milk delivery contract, and sought to annul a determination of the Board of Responsibility that it was not a responsible bidder. Employees of the petitioner had refused to sign a waiver of immunity before the Grand Jury concerning investigations involving the milk industry. The Board of Responsibility accorded to petitioner an opportunity to answer questions as to whether its bid was tainted by collusion, but the petitioner

chose to submit as a witness an employee who refused to answer pertinent questions, resting on his constitutional privilege. The Court upheld the Board's determination that the petitioner was not a responsible bidder.

It should be noted that here as in *Dairymen's League Cooperative Association, Inc., supra*, the bidder has not been convicted of a criminal offense. In such a case, temporary suspension pending resolution of the issues left unanswered is deemed to be the proper method of disposition by this Department.

This principle of law was clarified and upheld in a recent decision of the Appellate Division dated January 18, 1971, upholding the action of the Commissioner of Transportation in suspending Mal-Bros. Contracting Company for similar reasons to those adduced in this matter.

Where an indictment has been found it is appropriate to consider the fact of the indictment itself although a finding of guilt has not yet been reached in the criminal proceeding. An indictment is a written accusation of the crime drawn by the County or Federal Prosecutor and submitted to the Grand Jury and found and presented by the Grand Jury as a true bill. 42 C.J.S. 835 *Indictments and Information*, Section 7. Although an indictment is said to be an accusation of the charges brought against an accused, it is also said to be something "more than a mere accusation based on probable cause; it is an accusation based on legal testimony * * *." 42 C.J.S. at 836. Despite the usual presumption of innocence accorded to an accused the indictment need not and should not be disregarded in the circumstances presented here. In malicious prosecution cases the fact that an indictment has been brought by a Grand Jury (or that an accused

has been held over by a Magistrate), in legal effect is evidence of probable cause, that is to say, of reasonable grounds for believing that a party is guilty of the offence. *Galofaro* v. *Kwenstler*, 52 N. J. Super. 379, 384-385 (App. Div. 1958); *Prosser on Torts* (2d Ed. 1955) Malicious Prosecution, p. 657, Section 98.

Our courts have upheld administrative action based solely upon the return of indictments of filing of charges against individuals. *Russo* v. *Walsh*, 18 N. J. 205 (Sup. Ct. 1955); *DeMarco* v. *Board of Chosen Freeholders of Bergen County*, 21 N. J. 136 (Sup. Ct. 1956). In the *Russo* case, the Supreme Court considered the propriety of temporarily suspending from employment a State employee pending the outcome of charges for malfeasance in office. In discussing the relation of a temporary suspension to the question of guilt or innocence of the accused the Supreme Court said, 18 N. J. at 212:

> "A temporary suspension such as was ordered here does not, as appellant argues, constitute a premature adjudication of guilt any more than does the indictment of an accused under our criminal law. The question of his guilt or innocence is to be determined only after he has been accorded a full public hearing at which he will have an opportunity to be heard in his own defense. *Even in the criminal field, despite the presumption of innocence, our courts have the power to deprive persons under indictment for certain types of offenses of their liberty.* See R.R. 3:9-1.(a)(d). The power exists because experience has shown it is in furtherance of the general public good, although it undoubtedly infringes to a marked degree upon the personal liberty of the one involved.

> "In the case of state employees, the public interest likewise fully justifies the existence of the power to suspend temporarily pending a hearing. It is not contended the Governor acted in bad faith in the case *sub judice*, and the record discloses the appellant's suspension was ordered only after an officer appointed by the Governor had conducted an investigation and formal charges had been filed, of which appellant was given notice simultaneously with the suspension order. The merits of the charges are, of course, not before us." (Emphasis added.)

In the *DeMarco* case, *supra*, a police officer was suspended from duty and pay pending the outcome of an indictment against him. In commenting on his suspension the court said, in 21 N. J. at 139:

> "The propriety of the Deputy Attorney General's action seems beyond question for it would have been decidedly against public interest for the plaintiff to have served as a law enforcement officer while he was under indictment."

The action taken here should not be considered as a penalty for the offense charged but as administrative action for the prospective protection of the public interest which must be safeguarded. See: *Vance* v. *State of New Jersey*, 67 N. J. Super. 63 (App. Div. 1961), where the court said:

> "The suspension or revocation of a driver's license is not necessarily punitive in purpose. It is a measure 'for the prospective safety and protection of the traveling public in the nature of an auxiliary remedial sanction'."

*Appendix C*

I have been given broad discretion under the statutes to determine who are responsible bidders. It is my obligation to exercise that discretion in a manner that applies fairly to all prospective bidders. It is also my obligation to take measures to insure that the construction program of the State will be carried out expeditiously and faithfully by the contractors with whom this Department does business. In our view doing business with the State is a privilege that shall be accorded to those who establish to our satisfaction their qualifications, responsibility and integrity. In my view, an indictment reflects unfavorably upon the integrity of a contractor in connection with the bidding laws. To convict under the criminal laws it is necessary to establish the guilt of the accused beyond a reasonable doubt. But as an administrative officer, I need not judge qualification to do business with the Department by that standard of proof. *Mal-Bros. Contracting Co. v. John C. Kohl, Commissioner of Transportation*, Superior Court of New Jersey, 113 N. J. Super. 144 (1971). A copy of which is attached hereto and is marked "Exhibit B".

The fact that the offense stated in the indictment concerned bribery of Government officials is particularly noteworthy. In our view, such dealings with another Government agency are as reprehensible as if such dealings were with this particular Department. This is especially so when both agencies are part of State government and are but two arms of a single branch. It is indicia of conduct by the contractor in his dealing with Government entities.

Accordingly, it is hereby ordered that Michael J. Stavola Trap Rock Industries, Inc. be suspended from bid-

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ding until satisfactory explanations for the items contained in the indictment are adduced to satisfy this Department that Michael J. Stavola Trap Rock Industries, Inc. possesses the moral integrity to qualify as a bidder.

Joux C. Kom.
Commissioner of Transportation

Dated: May 7, 1971

# APPENDIX D

## Notice of Suspension

STATE OF NEW JERSEY
DEPARTMENT OF TRANSPORTATION
1035 PARKWAY AVENUE
TRENTON, NEW JERSEY 08625

JOHN C. KOHL
COMMISSIONER

March 29, 1971

Trap Rock Industries, Inc.
Laurel Avenue
Kingston, New Jersey 08528

Gentlemen:

Please Take Notice that there have been developments subsequent to the classification of Trap Rock Industries, Inc. to bid on Department of Transportation projects, namely, the indictment of Michael J. Stavola for alleged bribery, obstructing justice, and attempting to cause misconduct of a state officer, which in the opinion of the Commissioner of Transportation, would affect the responsibility of Trap Rock Industries, Inc. and authorize the Commissioner to void your classification. Accordingly, the classification of Trap Rock Industries, Inc. is hereby suspended.

Notice is hereby given to Trap Rock Industries, Inc. that an opportunity to be heard on this action will be afforded at the office of the Commissioner of Transportation, 1035 Parkway Avenue, Trenton, New Jersey, on any workday within the period ending April 8, 1971 by calling Mr.

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David A. Bieberman, Chief Counsel to the Commissioner, and making arrangements for the hearing.

Very truly yours,

JAMES R. SCHUYLER
James R. Schuyler
State Highway Engineer

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1073

TRAP ROCK INDUSTRIES, INC.,
a New Jersey Corporation,
*Petitioner,*

*vs.*

JOHN C. KOHL, Commissioner of Transportation, and
JAMES R. SCHUYLER, State Highway Engineer,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
*Attorney for Respondents,*
State House Annex,
Trenton, New Jersey, 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
*Of Counsel.*

ALFRED L. NARDELLI,
Deputy Attorney General,
*On the Brief.*

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. ———

TRAP ROCK INDUSTRIES, INC.,
a New Jersey Corporation,

*Petitioner,*

*vs.*

JOHN C. KOHL, Commissioner of Transportation, and
JAMES R. SCHUYLER, State Highway Engineer,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

### Counter-Statement of Questions Presented

1. Should the petition for writ of certiorari, seeking review of the summary suspension of the petitioner's right to bid on contracts with New Jersey Department

of Transportation, be denied due to matters [illegible] the petitioner has subsequently been debarred from bidding on the basis of the conviction for bribery of its President and principal stockholder?

Should the Court consider the petitioner's claims that its privilege against self-incrimination has been violated and that the suspension of its right to bid on contracts with the New Jersey Department of Transportation constituted a bill of attainder, where petitioner failed to raise these issues in the State courts below?

Is a State contracting agency constitutionally compelled to enter into contracts with a contractor, in the face of a grand jury's finding that there is a prima facie basis for the conclusion that the President and principal stockholder of the contractor is guilty of attempting to bribe a public official?

## Counter-Statement of Case

On March 17, 1971, a New Jersey State Grand Jury returned an indictment charging Michael J. Stavola and [illegible] with attempting to bribe a State Senator in a criminal charge then pending against Stavola and obstructing justice.

On March 29, 1971, the petitioner Trap Rock Industries, Inc. (hereinafter "Trap Rock") was notified that the indictment of Stavola, the principal of the corporation (80% stockholder, Chairman of the Board of Directors and President), was deemed by the Commissioner of Transportation to be a development affecting the responsibility of Trap Rock as a bidder on public works contracts with the State.

A hearing was held before the Commissioner on May 6, 1971 at which Trap Rock was given the opportunity to present information to substantiate its classification. Michael A. Stavola, the principal of Trap Rock, refused to present any information other than to note his plea of not guilty to the charges made in the indictment. Counsel for Trap Rock also refused to consent to an examination of the Grand Jury records by the Commissioner. On May 7, 1971, the Commissioner issued his decision that Trap Rock was temporarily suspended from bidding on State contracts until satisfactory explanation as to the charges contained in the indictment was adduced to persuade the Department of Transportation that the principal of Trap Rock, Stavola, possessed the requisite moral integrity to be allowed to bid on State contracts.

On June 30, 1971, the Appellate Division reversed the determination of the Commissioner, holding that the suspensions were illegal because of the absence of competent evidence establishing the commission of the alleged offenses. On November 22, 1971, the Supreme Court of New Jersey reversed the judgment of the Appellate Division and affirmed the action of the Commissioner. At no time during the course of this case through the courts of New Jersey did petitioner raise the issues that the Commissioner's action violated its privilege against self-incrimination or otherwise constituted a bill of attainder in violation of Article 1, §10 of the United States Constitution.

On November 22, 1971, Stavola was convicted in Monmouth County Court of the crimes of bribery and obstructing justice. Stavola was sentenced on January 21, 1972 to a term of not less than one year nor more than two years. A hearing was held by the State of New Jersey on February 15, 1972 to consider the advisement

of all companies in which Stavola has a substantial interest from bidding upon any procurement requirements with agencies of the State. As a result of this hearing, the Commissioner issued an order on March 16, 1972 debarring petitioner from doing any business with the State Department of Transportation for a period of five years.

## *ARGUMENT*

### POINT I

**The petition for writ of certiorari to review the affirmance by the Supreme Court of New Jersey of the temporary suspension of petitioner's right to bid on contracts with the New Jersey Department of Transportation should be denied due to mootness, because the petitioner has subsequently been debarred from bidding on the basis of the conviction for bribery of its President and principal stockholder.**

The issue which the petitioner seeks to bring before this Court is whether the New Jersey Commissioner of Transportation improperly "suspended" it from bidding on contracts to be awarded by the Department of Transportation:

> "until satisfactory explanations for the items contained in the indictment are addduced to satisfy this Department that Michael J. Stavola/Trap Rock Industries, Inc. possesses the moral integrity to qualify as a bidder." (128a).

However, the issue of the petitioner's suspension is now moot since, subsequent to the filing of the petition, petitioner was debarred from bidding for a period of five

years. This debarment was based on the conviction of Michael J. Stavola on the charges of bribery and obstructing justice contained in the indictment which was the basis for the original suspension.

After Stavola was convicted and sentenced, a hearing was held by the Commissioner of Transportation on February 15, 1972 to consider why Stavola and any of his corporations, including petitioner, should not be debarred from doing business with the State. As a result of this hearing, the Commissioner issued an order on March 16, 1972 debarring Stavola, petitioner and several other corporations in which Stavola had a substantial interest from doing business with the State for a period of five years. Since the only issue decided by the Supreme Court of New Jersey was the validity of the temporary suspension and the temporary suspension has been superseded by a five-year debarment based upon the criminal conviction of Stavola, the case is now moot.

An excellent illustration of this Court's refusal to give opinions upon moot questions may be found in *Local No. 6 v. Missouri*, 361 U. S. 363 (1960). In that case, a labor union had appealed from a judgment of the Supreme Court of Missouri affirming a decree which enjoined the union from continuing a strike against a public utility. During the litigation the strike ended and the injunction expired by its own terms. This Court held that the controversy was moot, stating that:

> "The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago. Any judgment of ours at this late date would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had

already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' Brownlow v. Schwartz, 261 U.S. 216, 217, 218 . . ." 361 U. S. at 371.

Similarly, in the present case an affirmance or reversal of the court below would be meaningless since the temporary suspension in question has expired and been replaced by a debarment.

## POINT II

**The petition for writ of certiorari must be denied as to the petitioner's claims that its privilege against self-incrimination has been violated and that the suspension of its right to bid on contracts with the New Jersey Department of Transportation constituted a bill of attainder because petitioner failed to raise them in the state courts below.**

The Court has often stated that it will not decide Federal constitutional issues raised for the first time in review of state court decisions. In *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), the Court after stating this general rule, went on to explain:

> "In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions raised below are those on which the record is very likely to be inadequate, since it certainly was not com-

> piled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them." 394 U.S. at 439

Accordingly, Rule 23 (f) of the Court's Rules provides that if review of the judgment of a state court is sought, the petition must specify the stage in the proceedings below, at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the court.

Petitioner failed to comply with Rule 23(f) as to at least two issues, those numbered four and five of the petition's "Question's Presented." The Supreme Court of New Jersey wrote a carefully reasoned twenty-three page opinion. At no time does this opinion touch upon the questions of whether the Commissioner's action in suspending Trap Rock from bidding violated petitioner's Fifth Amendment right to remain silent or constituted a bill of attainder in violation of Article 1, §10 of the United States Constitution. Moreover, petitioner did not raise these issues in its sixty page brief filed on the merits. In fact, the petitioner did not even cite in its brief below the main cases relied on in its petition to support its self-incrimination and attainder arguments:

i.e., *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Stevens* v. *Marks*, 383 U. S. 234 (1966); *United States* v. *O'Brien*, 391 U. S. 367 (1968); *United States* v. *Lovett*, 328 U. S. 303 (1946); *United States* v. *Brown*, 381 U. S. 437 (1965); *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951). In short, these issues are afterthoughts which the petitioner has sought to raise for the first time in the petition for writ of certiorari filed with this court.

Therefore the petition for writ of certiorari must be denied as to at least the petitioner's claims that its privilege against self-incrimination has been violated and that the suspension of its right to bid on contracts constituted a bill of attainder because petitioner failed to raise them in the state courts below.

## POINT III

**The Commissioner of Transportation, in suspending a bidder whose principal refused to explain an indictment charging an attempt to bribe a public official, acted in full accordance with fundamental fairness and due process of law.**

It is well settled that a governmental agency:

> ". . . enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127 (1940).

Accordingly, the New Jersey Legislature has mandated that the Department of Transportation do business with

"the lowest responsible bidder." N.J.S.A. 27:7-30. It has been clear in New Jersey for more than ten years that the concept of "responsibility" embraces moral integrity just as surely as it embraces a capacity to supply labor and materials. *Arthur Venneri Co. v. Paterson Housing Authority*, 29 N. J. 392, 403 (1959); *Mal-Bros. Contracting Co. v. Kohl*, 113 N. J. Super. 144, 147 (App. Div. 1971), certif. den. 58 N. J. 94 (1971).

Nevertheless the petitioner contends that by basing a suspension of a contractor upon an unexplained outstanding indictment of its principal stockholder, president and chairman of the board of directors, the Commissioner of Transportation violated its right to due process of law. Petitioner argues that since an indictment is not proof of its own allegations in the criminal trial itself, the Commissioner should not have been permitted to consider the indictment at the suspension hearing. However, an indictment does mean that a basis exists to believe the charge if the evidence on hand is not explained or contradicted. *Beavers v. Henkel*, 194 U. S. 73 (1904); *State v. Winne*, 12 N. J. 152, 178 (1953); 8 *Moore, Federal Practice* (2nd ed.) §603 [2], pp. 6-14. The indicted individual, Stavola, was given full opportunity before the Commissioner of Transportation to explain the allegations of the indictment, but refused to do so. Since conviction of the crime of bribing a public official would certainly justify debarment from bidding (as in fact has happened), an unexplained indictment for such a crime must be considered to be a proper basis for the suspension from such bidding, or else government would be powerless to refuse to do business with an alleged corrupt contractor pending the disposition of criminal charges.

Petitioner further questions why it should be suspended from bidding when its controlling stockholder was in-

dicted, and not the corporation itself. However, corporations are often held accountable for the misbehavior of their principals. In fact, in *Campbell Painting Corp. v. Reid*, 20 N. Y. 2d 370, 283 N. Y. S. 2d 31, 229 N. E. 2d 602 (Ct. App. 1967), *affirmed*, 392 U. S. 286 (1968), the Court upheld the statutory disqualification from bidding for five years by the New York City Housing Authority of a corporation because its *former* president (also a director and ten percent stockholder) had refused to sign a waiver of immunity before a grand jury investigating bid rigging. This result was reached even though all other officers, directors and controlling stockholders of the closely held corporation appeared before the grand jury and indicated a willingness to sign waivers of immunity and to testify. Thus the moral responsibility of a corporation, which necessarily must be controlled and operated by individuals, is one and the same with the moral responsibility of those individuals.

The chief thrust of the petition for writ of certiorari is that the Commissioner's action in suspending petitioner is invalid due to the absence of any rules or regulations which could forewarn bidders that if a principal of their corporation were indicted for bribery then the corporation's prequalification for bidding might be suspended if the principal did not adequately explain such indictment. In making this argument, the petitioner relies very heavily upon *Gonzalez v. Freeman*, 334 F. 2d 570 (D. C. Cir. 1964), which held that under the Federal Administrative Procedure Act the Commodity Credit Corporation may not *debar* a contractor in the absence of:

> ". . . administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to

present evidence and, to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made." 334 F. 2d at 578.

In *Gonzalez*, the suspended and subsequently debarred contractor never did have the opportunity to refute the charges against him at a hearing. In the present case, on the other hand, no action was taken against the petitioner until its principal, Michael Stavola, was given ample opportunity to explain his indictment at a full hearing before the Commissioner of Transportation. Furthermore, *Gonzalez* involved the procedural requirements for a *debarment* while the instant case involves merely a temporary suspension. In fact, the court in *Gonzalez* expressly stated that "a summary debarment, in the nature of a temporary suspension, might be warranted for a reasonable period pending investigation." 334 F. 2d at 579. Accordingly, the court did not disapprove of the fact that Gonzalez had been temporarily suspended for a period of over twenty-eight months, half of which passed before even the return of the indictment. In the present case, no action was taken until the petitioner's principal had been indicted *and* given an opportunity to explain the allegations of the indictment.

A different result in the instant case would force agencies of the State to enter into contracts with a contractor in the face of a grand jury's finding that there is a *prima facie* basis for a conclusion that the contractor is presently lacking the requisite moral integrity to do business with the State. The public interest certainly justifies a refusal to engage a contractor pending resolution of a criminal charge bearing upon moral responsibility. Nothing in the Constitution required the Commissioner

of Transportation to award public contracts to companies controlled by Michael Stavola while the State Government simultaneously expended public funds to prosecute Stavola on charges which, if proved (as they subsequently were), would establish beyond a doubt that he is not fit to hold the public trust.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.**

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey
*Attorney for Respondents.*

*Of Counsel*

STEPHEN SKILLMAN,
Assistant Attorney General.

*On the Brief*

ALFRED L. NARDELLI,
Deputy Attorney General.